Supreme Court, U. S.
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No. 79-1712

In the Supreme Court of the United States

OCTOBER TERM, 1979

CARPENTERS DISTRICT COUNCIL OF SOUTHERN COLORADO, and its affiliated LOCAL UNION 1340 of the United Brotherhood of Carpenters & Joiners of America, AFL—CIO,

Petitioners,

vs.

REID BURTON CONSTRUCTION, INC., a Colorado corporation,

Respondent.

No. 79-1712

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Petitioners,

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REID BURTON CONSTRUCTION, INC., a Colorado corporation,

Respondent.

No. 79-1712

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Reid Burton Construction, Inc., the Respondent herein, respectfully requests that Petitioners' Request for a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Tenth Circuit be denied.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 614 F.2d 698, 103 LRRM 2475 (C.A. 10, 1980), and appears in

Appendix B hereto. The District Court Opinion is unreported and appears in Appendix A. Earlier Opinions of the District Court and the Court of Appeals are reported at 91 LRRM 2875 (D. Colo. 1974) and 535 F.2d 598 (C.A. 10, 1976), *cert. denied*, 429 U.S. 907 (1976), and appear respectively in Appendices D and E.

JURISDICTION

The Court of Appeals' Judgment and Opinion was dated and entered of record on January 31, 1980, affirming the Judgment of the District Court. The jurisdiction of the Court is invoked by Petitioners under 28 U.S.C. §1254(1).

QUESTION PRESENTED

The sole issue before the Court is whether the Court of Appeals erred in affirming the Decision of the District Court that the District Council and Local 1340 waived their right to arbitration because of their dilatory and evasive pleading tactics before the District Court.

STATEMENT OF THE CASE

On July 13, 1973 Respondent, Reid Burton Construction, Inc. (hereinafter referred to as "Burton"), filed its Complaint against Carpenters District Council of Southern Colorado (hereinafter referred to as "District Council"), and Local 1340 of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO (hereinafter referred to as "Local 1340"), and Colorado Building and Construction Trades Council (hereinafter referred to as "Trades Council"). (App. C at p. 42). Paragraph 5 of the Complaint alleged that the District Council and Local 1340 were *parties* to the subject Collective Bargaining Agreement and that the Agreement "*governed the relationship*" between Burton and the Unions. (App. C at pp. 42-43). Because of its refusal to sign an agreement with the Colorado

Building and Construction Trades Council whereby Burton would only subcontract with other employers who were in contractual relationship with labor organizations affiliated with the Building Trades Council, the Building Trades Council picketed construction building sites during March and April of 1973. Union carpenters refused to cross the picket lines and Burton alleged a breach of the no-strike clause in the Collective Bargaining Agreement against the District Council and Local 1340 and sought monetary damages and an injunction against the Unions. (App. C at pp. 44-45).

On August 6, 1973, the Unions filed Motions to Dismiss, and on August 20, filed a Joint Brief in Support of these Motions to Dismiss. Nowhere in the Motions or in the Brief supporting them was the question raised whether there was a binding arbitration agreement. (App. A at p. 21).

Burton filed an Amended Complaint on September 14, 1973 which was identical to the original Complaint except that it deleted the prayer for injunction against the Unions. Paragraph 5 of the Amended Complaint repeated the allegation that the District Council and Local 1340 were parties to the Collective Bargaining Agreement and that the Agreement governed the relationship between the parties (App. C at p. 46).

Again, in response to the Amended Complaint, the Unions filed a Motion to Dismiss and a Brief in Support of the Motion. Once again they did not include, as an issue, the fact that the pleadings asserted a dispute which was otherwise arbitrable under the Collective Bargaining Agreement. (App. A at p. 22).

On November 9, 1973, an Answer to the Complaint was finally filed by the Unions which stated that while the Carpenters District Council of Southern Colorado was a party to the Agreement as alleged in the Complaint, Local 1340 was not a party to the Agreement (App. C at p. 47). The Answer and

Counterclaim filed simultaneously therewith asserted the existence of a grievance and arbitration procedure in the Collective Bargaining Agreement; alleged that the Court action was barred by Burton's failure to exhaust contractual remedies; and, by Counterclaim, asked to have the Court find that Burton violated the Collective Bargaining Agreement by not employing the grievance and arbitration procedure. [Id. at pp. 48-49]. Notably, such claim was made only on behalf of the District Council and not Local 1340.

Nowhere in the pleadings did either Union *ever* ask the Court to order Burton's dispute to arbitration. At any point during these proceedings Local 1340 could have acknowledged it was bound by the Collective Bargaining Agreement and expressed its willingness to arbitrate; it chose not to do so. A reply to the Counterclaim was filed by Burton on December 5, 1973 which, *inter alia*, alleged that the Defendants had waived any right they may have had to arbitration (App. C at p. 50) and that the doctrine of laches would apply to the Counterclaim [Id. at p. 50].

On March 11, 1974, the Carpenters District Council and Local 1340 filed an Amended Answer but did not amend their position that Local 1340 was not a party to the Contract. (App. C at p. 50). Thus, at each step, Local 1340 and Carpenters District Council passed up the opportunity to ask the Court for an order of arbitration and to express a willingness on their part to participate in arbitration. On March 11, 1974 the Unions filed a Pre-Trial Statement where an "uncontroverted" fact was claimed by the Unions to be as follows:

> "5. Defendant Local 1340 is not a party to the aforementioned collective bargaining agreement, whereas Carpenters District Council of Southern Colorado is a party to said Agreement." (App. C at p. 52).

Thus, the Unions passed up another opportunity to admit being bound by the Contract and to request arbitration of the

dispute. On July 18, 1974, the Unions filed a "Suggestion to Dismiss" with the Court pursuant to *Federal Rules of Civil Procedure*, Rule 12(h)(3), asserting that the Court was without jurisdiction because Local 1340 now agreed it was "subject to the terms and provisions of the Agreement" (App. C at pp. 52-54). However, while continuing to ask for Court dismissal, at no time did the Unions ask that the matter be arbitrated or express a willingness to arbitrate! On July 12, 1974, five days after agreeing that Local 1340 was subject to the terms and provisions of the Collective Bargaining Agreement, the Unions filed an Amended Pre-Trial Statement wherein they continued to allege that Local 1340 was not a party to the Collective Bargaining Agreement (App. A at pp. 23-24).

On August 2, 1974, Burton filed a Reply to the Unions' Suggestion to Dismiss opposing the Motion and moving for assessment of costs and attorney's fees against the Unions for their dilatory and evasive pleading and procedural tactics. (App. C at p. 54). Thereafter, and until the day of trial, the Unions continued to assert that the Court was without jurisdiction but failed to request that the matter be arbitrated and waited until the very day of the Trial, and then only when questioned by the Court, did they admit they sought arbitration. (App. A at pp. 25-26). Because of the time already invested in this case and because the Court felt that the Unions should not be permitted to frustrate the judicial process at that late date, Judge Winner proceeded with the Trial. (App. B at p. 34). The Court proceeded to find that the Unions had flagrantly violated their collective bargaining agreement with Burton resulting in a loss to Burton of $10,801.97 (App. D at p. 63).

At the conclusion of the Trial on the merits, the District Court felt reluctantly bound by the holding in *Operating Engineers Local 150 v. Flair Builders, Inc.*, 406 U.S. 487 (1972), and, therefore, determined that it was for the Arbitrator to decide whether Defendants had waived their right to arbitration. The Court ordered a stay pending arbitration of Burton's claim against the District Council and Local 1340, but

stated upon motion by Burton that it would grant dismissal "to perfect an appellate record." (App. D at pp. 65-66). On December 13, 1974, Burton so moved and on January 2, 1975, Judgment was entered dismissing the Complaint, as amended (App. B at pp. 34-35).

Burton appealed to the Court of Appeals. By an opinion dated May 9, 1976, the Court of Appeals held that when the alleged dilatory and evasive tactics took place before the Court, it was for the District Court, not the Arbitrator, to decide whether delaying *pleading* tactics constituted waiver of the right to arbitration. The Court remanded the case to the District Court for further proceedings to determine whether the District Council and Local 1340 waived any right they may have had to arbitration by their evasive and dilatory tactics before the Court, 535 F.2d 598 (C.A. 10, 1976) (App. E at p. 78). The Unions petitioned this Court for Certiorari and the request was denied. See *Reid Burton Construction, Inc. v. Carpenters District Council of Southern Colorado, et al,* 535 F.2d 598 (C.A. 10, 1976), *cert. denied,* 429 U.S. 907 (1976). On the record of pleadings as outlined above, the District Court concluded that the "pleadings and briefs filed for Defendants were evasive and dilatory . . . Plaintiff and the Court were lulled into a belief that Defendants wanted the Court to try the lawsuit, and that's what the Court did." (App. A at pp. 26-27).

On January 31, 1980, the Court of Appeals affirmed the District Court stating:

> ". . . [W]e cannot say that the finding of waiver by defendants, District Council and Local 1340, was clearly erroneous. We note the initial and consistent denial for one year of Local's status as a party; the ambiguous or confusing ultimate stance on this point; defendants' participation in numerous hearings, pre-trial conferences, motions, and other pleadings, and the deposing of witnesses; and their assertion of the arbitration clause merely as a

defense in bar and a counterclaim, without insisting upon or demanding immediately, as was their duty . . . enforcement of that provision." (App. B at pp. 39-40).

ARGUMENT FOR DENYING THE WRIT

The Decision of the Court of Appeals on Waiver of the Right to Arbitration When a Party Engages in Dilatory and Evasive Pleading Tactics is Not in Conflict With Decisions of Other Circuits.

The Petitioners have sought a Writ of Certiorari on two grounds. Firstly, they assert that the application of the "clearly erroneous" standard to the findings of the District Court constituted error because the issue of waiver is a matter of law rather than a matter of fact. (Pet. p. 11 n. 3)[1]

Secondly, Petitioners suggest that there is a controversy between the circuits with regard to the standard of what constitutes waiver of the right to arbitrate when the parties are involved in litigation of the issue (Pet. pp. 15-16). This allegation is totally without merit.

I. The Issue Before the District Court Was an Issue of Fact.

The Petitioners have asserted that the Court of Appeals did not point to any conduct which reflected an intentional relinquishment or abandonment by the Unions of their arbitration defense. In the absence of such intentional waiver, they suggest that the issue is "whether, *as a matter of law*, the arbitration defense should be deemed constructively waived because of, most significantly, the absence until trial of a request by the District Council and Local 1340 that arbitration be ordered." (Pet. p. 11).

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[1]References to the Petition for Writ of Certiorari shall be designated "Pet." with the numerical designation of the page immediately following.

The Unions had previously petitioned this Court for Certiorari with regard to the original decision of the United States Court of Appeals for the Tenth Circuit in remanding this case to the District Court for determination as to whether the conduct of the Unions constituted estoppel or waiver of its right to arbitration. The Petition for Certiorari was denied. See, *Reid Burton Construction, Inc. v. Carpenters District Council of Southern Colorado, et al.*, 535 F.2d 598 (C.A. 10,, 1976), *cert. denied*, 429 U.S. 907 (1976). In remanding to the District Court, the Tenth Circuit detailed the issue to be decided by the lower court

> "It is entirely appropriate in some instances for a district court to retain Section 301 jurisdiction of an arbitrable dispute where, because of conduct before the court, it may be deemed that a party is prevented on the basis of some equitable principle from asserting a right to arbitration. Whether the instant case is one such instance has not been decided. Therefore, we remand this case for such a determination. If the District Court finds that there has been no estoppel or waiver because of the unions' conduct in pleading, then it is proper to order arbitration of the underlying dispute — the alleged violation of the no-strike clause. If on the other hand it is determined that the unions have waived their right to arbitration, or in some other way have been prevented from asserting this right, because of conduct which falls within the control of the court, then the district court can properly proceed to the merits of the underlying dispute."
> (App. E at p. 78) 535 F.2d 598 (C.A. 10, 1976).

The only issue before the District Court on remand was whether the "Unions' conduct in pleading" constituted a waiver of their right to arbitration. Clearly that determination depends on the facts in the case.

The Tenth Circuit, citing *Burton Dixie Corp. v. Timothy McCarthy Construction Co.*, 436 F.2d. 405, 408 (C.A. 5, 1971), stated:

> "There is no set rule as to what constitutes a waiver or abandonment of the arbitration agreement; the question depends upon the facts of each case and usually calls for a finding of the trier of facts." (App. B at p. 38).

It is within the sound discretion of the trial court to determine what constitutes laches, and that determination should be made on the equitable circumstances of each case. *Czaplicki v. S.S. Hoagh Silver Cloud*, 351 U.S. 525 (1955).

The District Court found that the following actions of the Unions constituted "dilatory and evasive" pleading tactics: their initial denial of party status to the collective bargaining agreement, and later admission of such status, deposing witnesses, participating in pre-trial conferences, numerous motions and other pleadings, without ever insisting on or demanding arbitration. Such evasive and dilatory pleading tactics constituted waiver of the Unions' right to arbitration. See, *Cornell & Company v. Barber & Ross Company*, 360 F.2d 512 (D.C. Cir., 1966); *General Guaranty Insurance Company v. New Orleans General Agency, Inc.*, 427 F.2d 924 (C.A. 5, 1970); *Robert Lawrence Company v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (C.A. 2, 1959) *appeal dismissed*, 364 U.S. 801 (1960); *American Locomotive Company v. Chemical Research Corp.*, 171 F.2d 115 (C.A. 6, 1948), *cert. denied*, 336 U.S. 909 (1949); *E. T. Simonds Const. Co. v. Local 1330 of Int. Hod Carriers*, 315 F.2d 291 (C.A. 7, 1963); *Radiator Specialty Co. v. Cannon Mills*, 97 F.2d 318 (C.A. 4, 1938); *Hilti, Inc. v. Oldach*, 392 F.2d 368 (C.A. 1, 1968); *Carcich v. Rederi A/B Nordie*, 389 F.2d 692, (C.A. 2, 1968); *Kulukundis Shipping Co. v. Amtorg Training Corp.*, 126 F.2d 978 (C.A. 2, 1942); *Local 198, United Rubber, C. L. & P. Wkrs. v. Interco Inc.*, 415 F.2d 1208 (C.A. 8, 1969); *Burton Dixie*

Corp. v. Timothy McCarthy Construction Co., 436 F.2d 405 (C.A. 5, 1971).[2]

The Court of Appeals reaffirmed the well-established policy that the right of arbitration, like any other right, can be waived. See *Cornell & Company v. Barber & Ross*, 360 F.2d 512 (D.C. Cir., 1966); *Radiator Specialty Company v. Cannon Mills, Inc.*, 97 F.2d 313 (C.A. 4, 1938); *E. I. DuPont DeNemours & Company v. Lyles & Lang Construction Company*, 219 F.2d 328 (C.A. 4, 1955); *American Locomotive Company v. Gyro Process Company*, 185 F.2d 316 (C.A. 6, 1950); *Galion Ironworks v. Adams*, 128 F.2d 411 (C.A. 7, 1942). The Court of Appeals correctly indicated that the question of whether the Unions waived their arbitration defense depends on the facts of the case and requires a finding by the trier. (App. B at p. 38). The District Court made a determination on the issue before it, and the Court of Appeals properly applied the "clearly erroneous" standard to that Decision. See *Sheetmetal Workers Int. Ass'n. v. Los Alamos Const.*, 550 F.2d 1258 (C.A. 10, 1977). See also *Commission of Internal Revenue v. Dubenstein*, 363 U.S. 278, 80 S. Ct. 1190 (1960); Fed. R. Civ. P.; Rule 52(a).

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[2]In the cases cited by Petitioners in their Petition for Writ of Certiorari, where the Court granted a stay pending arbitration, a shorter period of time had elapsed between the initiation of the litigation and their request for stay. In *Robert Lawrence Company v. Devonshire Fabrics Co., Inc.* 271 F.2d 402 (C.A. 2, 1959), *appeal dismissed*, 364 U.S. 801 (1960), Plaintiff had also been apprised by the Defendant early in the proceeding that its intent was to arbitrate the matter, such was not the case herein. In *Carcich v. Rederi A/B Nordie*, 389 F.2d 692 (C.A. 2, 1968), the court stated that while the law is clear that participation in litigation, standing alone, does not constitute a waiver, waiver may be inferred where there has been some resultant prejudice to a party. In the instant case the Court of Appeals noted that, "the preparations until that time for trial in the Court do, in our opinion, amount to sufficient prejudice that it is inequitable for a party at that point to shunt the controversy over to the arbitration procedures." (App. B at p. 40). See also *American Locomotive Company v. Chemical Research Corporation*, 171 F.2d 115 (C.A. 6, 1948), *cert. denied*, 336 U.S. 909, 69 S. Ct. 515 (1949).

II. The Court of Appeals' Decision Does Not Conflict With The Decision of Other Circuits on The Question of The Waiver of The Right to Arbitration.

While the Petitioner cites numerous cases for the proposition that the federal policy favors arbitration, the Unions rely primarily on just one case, *Controlled Sanitation Corp. v. Machinists District 128*, 524 F.2d 1324 (C.A. 3, 1975), *cert. denied*, 424 U.S. 915 (1976) in alleging that the decision of the Tenth Circuit herein conflicts with decisions of other circuits on the question of the waiver of the right to arbitration.

The Tenth Circuit specifically noted that *Controlled Sanitation supra*, is clearly distinguishable from the instant case:

> "The majority opinion there (in *Controlled Sanitation*) noted specifically, *id.* at 1326 n. 3, that while the unions had taken a position that there was no collective bargaining agreement, they clearly reserved the right that the dispute should be submitted to arbitration, should the Court find otherwise. That is not the case here. While the defendants were asserting their changing positions concerning the agreement, they did not, until the day of trial, assert as either a primary or alternative position a request for a stay or for an order for arbitration." (App. B at p. 40).

The determination by the Court of Appeals that the Unions had a duty to demand arbitration immediately is well founded and is totally consistent with the decision of other circuits deciding on similar facts. For example, the Court of Appeals correctly cited *Radiator Specialty Company, supra*, which stated:

> "Arbitration laws are passed to expedite and facilitate the settlement of disputes and avoid the delay caused by litigation. It was never intended that these laws should be used as a means of furthering

> and extending delays. Under the statute above quoted [Federal Arbitration Act, 9 U.S.C. §3], it is clearly the intention of Congress to provide that the party seeking to enforce arbitration can do so only when not guilty of dilatoriness or delay. One having the right to arbitrate and to stay an action at law, pending arbitration under this statute, may waive such right." 97 F.2d at 319.

See also *Cornell & Company v. Barber & Ross Company*, 360 F.2d 512 (D.C. Cir., 1966); *General Guaranty Ins. Co. v. New Orleans General Agency, Inc.*, 427 F.2d 924 (C.A. 5, 1970); *Robert Lawrence Company v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (C.A. 2, 1959); *American Locomotive Company v. Chemical Research Corp.*, 171 F.2d 115 (C.A. 6, 1948, *cert. denied*, 336 U.S. 909 (1949); *E. T. Simonds Construction Co. v. Local 1330 of Int. Hod Carriers*, 315 F.2d 291 (C.A. 7, 1963); *Hilti, Inc. v. Oldach*, 392 F.2d 368 (C.A. 1, 1968); *Carcich v. Rederi A/B Nordie*, 389 F.2d 692 (C.A. 2, 1968); *Kulukundis Shipping Co. v. Amtorg Training Corp.*, 126 F.2d 978 (C.A. 2, 1942); *Local 98, United Rubber, C.L. & P. Wkrs. v. Interco, Inc.*, 415 F.2d 1208 (C.A. 8, 1969); *Burton Dixie Corp. v. Timothy McCarthy Construction Co.*, 436 F.2d 405 (C.A. 5, 1971).[3]

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[3]The cases cited by the Petitioners on pp. 15-16 do not support their proposition that a Court cannot find that a party waived its right to arbitration, even if it deliberately delayed for over a year, after engaging in litigation, before it requests a stay pending arbitration. In *Shanferoke Coal Supply Corporation v. Westchester Serv. Corp.*, 70 F.2d 297 (C.A. 2, 1934), the Defendant, in its Answer and Affidavits, expressed its willingness to submit to arbitration, such was not the case herein. In *Kulukundis Shipping Company v. Amtorg Trading Corp.*, 126 F.2d 978 (C.A. 2, 1942), the Court specifically distinguished *Radiator Specialty, supra*, by stating that the Defendant had not, as here, filed a counterclaim and did not participate in the lawsuit without seeking arbitration. *Martin Marietta Aluminum, Inc. v. General Electric Company*, 586 F.2d 143 (C.A. 9, 1978) is in no way similar to the instant case; unlike the situation herein, the contract in *Martin Marietta* specifically *relieved* the Defendant of *any* obligation to request arbitration. Further, in *Aircraft Lodge 703 v. Curtiss-*

The Court of Appeals, in keeping with this longstanding policy and the standards applied by the other circuits for a finding of waiver, affirmed the finding of the District Court that the Unions waived their right to arbitration by not requesting arbitration at the outset, as was their duty.

There can be no question that the Decision of the Tenth Circuit Court of Appeals in this instant case does not conflict with other circuit decisions involving similar facts.

CONCLUSION

Clearly, the Petitioners do not assert any colorable grounds for the grant of a Writ of Certiorari in this case. The issue which was remanded by the Tenth Circuit to the District Court was to make a factual determination as to whether the Unions had engaged in dilatory and evasive pleading tactics before the Court, thereby waiving their right to arbitration. Applying the well-settled legal standards regarding the waiver of the right of arbitration, the District Court made a factual determination that the Unions did indeed engage in such dilatory and evasive pleading tactics and found that they waived their right to arbitration. The Court of Appeals concluded that ". . . we cannot say that the finding of waiver by Defendant District Council and Local 1340 was clearly erroneous." (App. B at pp. 39-40) and affirmed the judgment of the District Court.

Since the issue on remand to the District Court was a factual issue, the Court of Appeals correctly applied the

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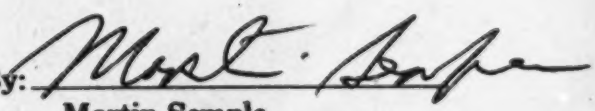
[3](Continued)

Wright Corp., 169 F. Supp. 837 (D.N.J., 1959), the Defendant promptly obtained an Order from the Court to show cause under the terms of the Federal Arbitration Act staying the trial pending arbitration. Defendant also stated its willingness to arbitrate and repeatedly asked the Plaintiff to do so. In *Kastanias v. Nationwide Auto Transporters, Inc.*, 390 F.Supp. 720 (W.D. Pa., 1975), Defendants made a demand for arbitration upon Plaintiffs soon after the action was filed.

"clearly erroneous" standard to that Judgment, and since there is no conflict between this Decision of the Tenth Circuit and the other circuits on the question of waiver of the right to arbitration in similar circumstances, the Petition for Writ of Certiorari to the Tenth Circuit Court of Appeals for review of its Decision should be denied.

Respectively submitted,

GOOD AND STETTNER, P.C.

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of June, 1980, ~~a copy~~ Three Copies of the foregoing Brief in Opposition to Petition for a Writ of Certiorari To the United States Court of Appeals for the Tenth Circuit ~~was~~ were deposited in the U.S. Mails, postage prepaid, and addressed to John W. McKendree, Esq., McKendree & Lubin, 1244 Grant Street, Denver, Colorado 80203, attorneys for Petitioners.

Mark L. Evans

APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. C-5184

REID BURTON CONSTRUCTION, INC., a Colorado corporation, Plaintiff, vs. CARPENTERS DISTRICT COUNCIL OF SOUTHERN COLORADO, LOCAL 1340 of The INTERNATIONAL BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, COLORADO BUILDING AND CONSTRUCTION TRADES COUNCIL, unincorporated associations and labor organizations, Defendants.	MEMORANDUM OPINION

This hoary case is ready for decision again. November 19, 1974, I thought I had touched all bases in a way which would decide the case whether I was right or wrong on the difficult questions of law presented. I had earlier dismissed Colorado Building and Construction Trades Council, (a dismissal which was not appealed) and, as to the other two defendants, I said that I was convinced that each had violated a no-strike clause

of their contract with plaintiff. I also said that I was convinced that plaintiff sustained damage, and I fixed the damages at $6,392.52 on the "Markley Motors job," and $4,409.45 on the "Everitt job." All of this is explained in my earlier opinion, and it need not be repeated here. The predictable appeal which followed didn't question the finding of contract breach or damages. It argued only jurisdiction.

In my November, 1974, opinion, I said, "Having found that defendants broke their promise not to strike and having found the amount of damages resulting to plaintiff as a result of defendants' breach of contract, I must face up to the question of whether I have jurisdiction to enter judgment against defendants. To do this, I must decide whether the arbitration clause covers the dispute and makes arbitration mandatory. Then, I must decide whether because of waiver, repudiation, estoppel, laches or any other reason, the matter should not be sent to the arbitrator." After analyzing *Drake Bakeries v. Bakery Workers*, (1962) 370 U.S. 254, and *Atkinson v. Sinclair Refining Co.*, (1962) 370 U.S. 238, I concluded that the question was one covered by the arbitration clause. I added that although I didn't like the result, and although I personally agreed with Justice Powell's dissent, I thought that *International Union of Operating Engineers Local 150 v. Flair Builders*, (1972) 406 U.S. 487, precluded me from deciding and forced me to let the arbitrator decide whether defendants' conduct estopped them from insisting on arbitration or whether they had waived their right to arbitration. [I think that it was pretty clear in that opinion what I wanted to hold.] The Court of Appeals said that I was right in holding that the basic question was covered by the arbitration clause, but it said that I was wrong in holding that I was bound by the result in *Flair Builders* which I thought required the conclusion that equitable questions were for an arbitrator to decide. Chief Judge Lewis distinguished *Flair Builders* saying:

> "In sum we conclude that the enumerated equitable defenses discussed are, in general, mandated by Flair

Builders to the arbitrator for determination of the continued vitality of the contractual arbitration process. However, if such defenses arise solely during the course of the judicial process the arbitrator is not the one to determine whether the judicial process has been abused by either party or at all or whether an equitable defense to the main dispute has been established during the course of the judicial trial by in-trial conduct."

Defendants asked for certiorari, but the Supreme Court refused to accept the case. Upon receipt of the remand, I made inquiry as to whether any party wanted to take more testimony, and all parties notified the court in writing that additional evidence was not desired. It was agreed that the case would be decided on the record made, and a briefing schedule was agreed to. The last brief was filed April 1, 1977, and the case is ready for me to try once more for final disposition.

Without rehashing all that has been said before, I incorporate by reference the facts found in my earlier opinion, and I repeat that I take a dim view of defendants' whirlygig positions during the course of the litigation. As I shall explain presently, I think that advertently or inadvertently the court and plaintiff's counsel were led down a primrose path by a failure on the part of defendants' counsel to communicate to the court and opposing counsel in a timely way the argument of defendants that the dispute was one subject to arbitration. These are some of the things which led up to setting a case for trial and trying a case which was subject to arbitration unless, as phrased by Chief Judge Lewis, "the unions should be prevented from demanding arbitration because of 'evasion' and 'dilatory' pleading practices before the court." After relating some of the 180 degree course changes by defendants, I said in my opinion of two and a half years ago that "sophistry such as this does not help a court in its futile efforts to keep up with an over-crowded docket." I haven't changed my mind, and I am sure that it comes as no surprise to anyone that now that the

Court of Appeals has said that I have jurisdiction to do so, I unhesitatingly hold that the unions are "prevented from demanding arbitration because of 'evasive' and 'dilatory' pleading practices before the court." Here are a few of the reasons why: —

Plaintiff filed an original and an amended complaint. Both pleaded that plaintiff and the two defendants "were parties to a collective bargaining agreement," and that the agreement "governed the relationship" between plaintiff and defendants. The defendants answered the original complaint and they answered the amended complaint. Both answers denied that either defendant was a *party* to the agreement, and it was denied that the agreement governed their relationship. They did not admit anywhere in these pleadings that they were "bound" by the agreement and they did not say that they would be subject to or that they would live by an arbitrator's decision. The complaint was filed July 13, 1973, and it was but three days short of a year thereafter that the defendant Local first said that it was *"bound"* by the contract, even though it was not a *"party"* to a contract which did not "govern the relationship" of the litigants. I repeat what I said November 19, 1974, after everyone's efforts and time had been expended in getting the case to trial:

> "Defendants argue that they have not changed their position, and they explain that the time spent by plaintiff's counsel and the court in preparing the case for trial was wasted time because plaintiff's counsel and the court should have read more literally defendant's assertions that Local 1340 was not a *party* to the contract and should not have been taken aback by defendant's July 10, 1974, assertion that the non-party local was *bound* by a contract to which it is not a *party, and this even though defendants had denied that they were governed by the agreement.*"

Defendants must be students of Lewis Carroll, because, as was said in *Through the Looking Glass:*

> "'When I use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean — neither more nor less.'
>
> "'The question is,' said Alice, 'whether you can make words mean so many different things.'
>
> "'The question is,' said Humpty Dumpty, 'which is to be master — that's all.'"

Defendants' reasoning escapes me. They say that they are non-parties to a contract but that they are "bound" by a contract to which they aren't a party. I know about third-party-beneficiaries of a contract, but the concept of "third-party-obligors" is new to me.

In more detail, the history of the case is that the first complaint was filed July 13, 1973, and, as I have said, it pleaded that plaintiff and defendants were parties to a collective bargaining agreement and that the agreement "governed their relationship." Defendants moved to dismiss, but the motion and brief supporting it did not raise the question of whether there was a binding arbitration agreement. The slightest mention of *Boys Market, Inc. v. Retail Clerks Union,* (1970) 398 U.S. 235, *Gateway Coal Co. v. Mineworkers Union,* (1974) 414 U.S. 368, the *Steel Trilogy cases,* or any of countless other cases would have led immediately to *Drake Bakeries v. Bakery Workers,* (1962) 370 U.S. 254, and *Atkinson v. Sinclair Refining Co.,* (1962) 370 U.S. 238, and the lawsuit would have been all over at that point if defendants had then suggested that there was an agreement to arbitrate, binding on both parties. The jurisdictional question was available to defendants on motion to dismiss — in fact that is the way it is typically raised — but defendants argued for dismissal on unrelated grounds without mention of any contention that I

should order arbitration of a contract dispute by a non-party to the agreement.

The amended complaint asked for no injunction, but in other respects it was the same as the first complaint. Once more, defendants moved to dismiss, but neither the motion nor the brief in support gave any clue that defendants thought there was a *Boys Market* problem, and the thought surely didn't occur to me. Again, defendants gave no hint that they wanted me to order arbitration.

November 9, 1973, defendants answered. Paragraph 5 of the amended complaint is the paragraph which said that defendants were parties to the agreement and that it governed their relationship. Defendants denied the averments of paragraph 5, and they *affirmatively pleaded* that the District Council was a party to the agreement, but that *"Defendant Local 1340 is not a party* to the aforementioned collective bargaining agreement." It is true that the answer said that Burton had failed to exhaust the contractual remedies and defendants said that Burton had violated the agreement by not seeking arbitration, but there was no claim made that the court was without jurisdiction because the parties were contractually bound to arbitrate — and under defendants' then position the Local wasn't a party to the contract nor was there suggestion of the "third-party-obligor" concept. Nowhere was there any suggestion that defendants were either parties to the agreement or that the Local was "bound" by it. Had the Local taken this position at that time, and had it said that there was an arbitration agreement binding on everyone in the lawsuit, a summary judgment motion would have been granted with all convenient speed. Defendants didn't move for summary judgment, and they let the case crawl towards a trial. A reply to the counterclaim was filed directed to the claim of contract violation by Burton, and, once more, *plaintiff said* that the defendants were both *parties* to the agreement. The reply was filed December 5, 1973, and three months later the defendants filed an amended answer which, all over again, did not admit

that the Local was a party to the contract nor did it suffice to clue me in on the idea that the Local was "bound" by a contract to which it was not a party and which didn't govern the relationship between the parties.

The same day the amended answer was filed, all parties filed pretrial statements. Plaintiff listed as the first contested issue of fact:

> "1. Is Defendant Local 1340 a party to the subject labor agreement?"

Defendants statement said, inter alia:

> "The Defendant Carpenters District Council of Southern Colorado is a party to the aforementioned collective bargaining agreement with the plaintiff . . . Furthermore, the *defendant Local 1340 is not a party* to the aforementioned collective bargaining agreement with the plaintiff . . . It is the defendant Carpenter Union's position that these two alleged violations of the collective bargaining agreement are clearly disputes involving the interpretation and application of said collective bargaining agreement and, therefore, the resolution of these disputes lies solely and exclusively within the province of the dispute resolution machinery contained in Article XII of said collective bargaining agreement. Thus this court has no jurisdiction over the subject matter of the action. . . ."

> [I concede that careful study of this statement could alert a suspicious person, but plaintiff's counsel and I didn't react to the double talk.]

And, although plaintiff said that the fact was controverted, *defendants said* in their pretrial statement that an "uncontroverted fact" was,

> "*Defendant Local 1340 is not a party* to the aforementioned collective bargaining agreement, whereas Carpenters District Council of Southern Colorado is a party to said agreement."

For sure, defendants acquiesced in setting the case for trial, and their pretrial statement cheerfully estimated the length of trial to be held in this court.

It is to be remembered that as was emphasized in *Boys Market, Sinclair Refining Co. v. Atkinson,* (1962) 370 U.S. 195, insists that arbitration agreements under no-strike clauses will be enforced only if the dispute involves "a grievance which both parties are *contractually bound* to arbitrate." I say again, that although defendants have no problem with non-parties being "contractually bound," I am challenged by the concept, and no such thought came to mind as long as defendants were arguing that the Local wasn't a *party* to the contract.

> ". . . the Red Queen said to Alice, 'Always speak the truth — think before you speak — and write it down afterwards.'
>
> "'I'm sure I didn't mean ---' Alice was beginning, but the Red Queen interrupted her impatiently.
>
> "'That's just what I complain of! You *should* have meant!"
>
> . . . . . .
>
> "'She's in that state of mind,' said the White Queen, 'that she wants to deny *something* — only she doesn't know what to deny!"

It was on July 18, 1974, that defendants decided what they wanted to admit and what they wanted to deny, because that day they filed a "Suggestion to dismiss." It was supported by a brief which said, "Although heretofore the defendants have

questioned whether the Defendant Local 1340 was a party to the collective bargaining agreement entered into by Reid Burton and the Carpenters District Council of Southern Colorado, the Defendants herein state that Local 1340 is subject to the terms and provisions of the agreement." Here was the first suggestion of expansion of third-party-beneficiary principles to third-party-obligors, but if defendants' true position wasn't crystal clear as of July 19, 1974, when it filed its "Suggestion to dismiss," the clarity of defendants' thinking was further obfuscated by its *amended pretrial statement filed five days* after the "Suggestion to dismiss":

> ". . . the Defendant Local 1340 is not a party to the aforementioned collective bargaining agreement with the plaintiff,"

and that same day plaintiff's amended pretrial statement listed as an issue the question of whether the local was a party to the agreement. This brought the matter to a head, and defendants were asked to explain in words even the court could understand just what their position was. This is the explanation:

> "Defendants' position is simply that, although Local 1340 is not a party to the agreement, it is bound by the substantive terms of the agreement."

This, defendants said, deprived the court of jurisdiction, but defendants made no offer to obtain nor did they agree to submit to binding arbitration. In the words of *Sinclair*, defendants admission that the Local (a non-party to the contract) is "bound" by the agreement's substantive terms, is not to me an all out admission that the Local was "contractually bound to arbitrate."

On this queasy record the case went to trial on October 1, 1974, and I was astonished to find out that defendants wanted

me to issue a mandatory *Boys Market* type injunction ordering plaintiff to arbitrate. The record shows my surprise:

> "THE COURT: Now tell me, when do you say you first requested that I, by mandatory injunction, order plaintiff to arbitrate? I must question that. I have difficulty in reading your pleadings, so tell me where and when you say you first requested that mandatory injunctive relief?
>
> "DEFENSE COUNSEL: When requested to do so today, your honor.
>
> "THE COURT: All right. That's what I thought . . . Is it possible . . . put very inartfully . . . that the defendants really didn't want arbitration until their feet got right in the fire?"

The answer by counsel wasn't very helpful to me. Accordingly, because of the time already invested in the case and because of my then thinking that defendants shouldn't be permitted to frustrate the judicial process at that late date, I went ahead with the trial. [No one had called *Flair Builders* to my attention at time of trial, and it was with chagrin that I read it post trial. I only wish that I had thought of the analysis of it made by the Court of Appeals, because I surely hated to go along with what I thought it said.]

I do not say that there was conscious misrepresentation on the part of counsel. I think that the pleadings were hastily drawn and perhaps counsel didn't really face up to the lawsuit until the eve of trial. I say this to emphasize that I think that the unfortunate results may have been largely inadvertent rather than intentional, but the impact on the court and on plaintiff were the same no matter what the intent of defense counsel. The pleadings and briefs filed for defendants were evasive and dilatory, and whether they were so because of intent or as a result of negligence, plaintiff and the court were

lulled into a belief that defendants wanted the court to try the lawsuit, and that's what the court did. I must confess that as I think back on the farce of the union's claim that there was no "strike" and their claim that there was only "voluntary individual action," and when I recall the remarkable coincidence of immediate punitive action against two carpenters who didn't "voluntarily stay away from work," I am unconvinced that the union's conduct was pristine. When union members who live in Longmont, Colorado, who don't "voluntarily stay away from work," in Fort Collins, Colorado, are ordered to stand union trial in Montrose, Colorado, and when they are swiftly convicted and fined by the union because of their failure to "voluntarily stay home," it strains credulity to think that there wasn't just a little malice aforethought.

I am sure that the record in this case demonstrates that the conduct of defendants *in this case in this court* establish the equitable defenses to arbitration mentioned by Chief Judge Lewis, and I so hold. The unions played games with plaintiff and the court too long to now insist on an injunctive order requiring plaintiff to arbitrate this stale dispute.

The rest is easy, and to the best of my knowledge it wasn't attacked on appeal. November 19, 1974, before reaching the question of whether I had jurisdiction under *Drake, Sinclair* and *Flair*, I found factually:

> "The record in this case convinces beyond peradventure that Carpenters District Council of Southern Colorado violated the no strike clause of the labor contract to which it was a party and that Local 1340 of the International Brotherhood of Carpenters & Joiners of America, AFL-CIO violated the same provision of the same contract which the local has not judicially admitted was binding on it. The defendants flagrantly violated the contract jointly and severally.

"Plaintiff sustained damage as a result of those violations. The fact of damage is certain, although the amount of damage is somewhat less certain. Defendants did not controvert the damage testimony and the record made in this case permits a finding, and I find that as a result of defendants' contract violation, plaintiff was damaged in the amount of $6,392.52 on the Markley Motors job and in the amount of $4,409.45 on the Everitt job. The plaintiff was damaged in the total amount of $10,801.97 as a direct and proximate result of defendants' flagrant violations of the contract's provisions."

Judgment shall enter in favor of plaintiff and against defendants in the amount of $10,801.97, plus interest and costs as permitted by law.

Dated this 18th day of April, 1977.

/s/ Fred M. Winner
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

REID BURTON CONSTRUCTION, INC., Plaintiff, vs. CARPENTERS DISTRICT COUNSEL OF SOUTHERN COLORADO, LOCAL 1340 OF THE INTERNATIONAL BROTHERHOOD OF CARPENTERS JOINERS OF AMERICA, AFL-CIO, and COLORADO BUILDING AND CONSTRUCTION TRADES COUNSEL, Defendants.	)	Civil Action No. C-5184 **JUDGMENT**

Pursuant to and in accordance with the Memorandum Opinion signed by The Honorable Fred M. Winner, Chief Judge, and filed on April 19, 1977, it is hereby

ORDERED that judgment is entered in favor of plaintiff, Reid Burton Construction, Inc., and against defendants, Carpenters District Counsel of Southern Colorado, Local 1340 of the International Brotherhood of Carpenters Joiners of America, AFL-CIO and Colorado Building and Construction Trades Counsel, in the sum of Ten thousand eight hundred one and 97/100 dollars ($10,801.97) plus interest at the legal rate as provided by law; it is

FURTHER ORDERED that the plaintiff have and recover costs upon the filing of a bill of costs with the Clerk of this Court. The bill of costs must be filed within 10 days after entry of this judgment.

DATED at Denver, Colorado, this 19 day of April, 1977.

FOR THE COURT:

JAMES R. MANSPEAKER, Clerk
United States District Court

Approved:

FRED M. WINNER
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

REID BURTON CONSTRUCTION, INC., a Colorado corporation, Plaintiff-Appellee,	)	
v.	)	
CARPENTERS DISTRICT COUNCIL OF SOUTHERN COLORADO, and LOCAL NO. 1340 of the UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AFL-CIO,	)	NO. 77-1458
Defendants-Appellants.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. No. C-5184)

Robert I. Cohn, Denver, Colorado (Robert G. Good and Martin Semple of Good and Stettner, Denver, Colorado, were on the brief) for Plaintiff-Appellee.

John W. McKendree (McKendree & Lubin, Denver, Colorado, were on the brief) for Defendants-Appellants.

Before HOLLOWAY, DOYLE and LOGAN, Circuit Judges

HOLLOWAY, Circuit Judge

This appeal brings before us for the second time a dispute involving alleged breach of the no-strike clause of a collective bargaining agreement, asserted as a §301 suit under 29 U.S.C. §185, between plaintiff Reid Burton Construction, Inc. (Burton), and defendants Carpenters District Council of Southern Colorado (District Council) and Local 1340 of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Local 1340 or Local).

I

The relevant facts are as follows. The complaint (II R. 1-6), filed July 13, 1973, and the amended complaint (II R. 73-77)[1] based jurisdiction on Section 301 of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. §185,[2] and in paragraph 5 alleged that defendants were parties to the collective bargaining agreement and that the agreement governed the relationship between the parties. Following denial of their motions to dismiss,[3] defendants on November 9, 1973, filed an answer[4] in which they denied the allegations of paragraph 5,

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[1]The complaint and the amended complaint were identical, except that the latter deleted plaintiff's request for injunctive relief.

[2]Section 185(a) of Title 29, U.S.C. provides:

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

[3]These motions were filed in response to plaintiff's complaint and amended complaint and were denied on October 26, 1973. (I R. 115). On November 23, 1973, another defendant, Colorado Building and Construction Trades Council (Trades Council), was dismissed from the suit. (I R. 84, 115; II R. 138-39; III R. 307).

[4]Though defendants later amended their answer, the changes did not relate to the issue presented in this appeal.

stating that District Council was party to an agreement with plaintiff but that Local 1340 was not a party. The answer also asserted the contract's arbitration clause as a bar to plaintiff's action and as the basis of a counterclaim for breach of the agreement and damages.[4a]

Defendants maintained this position throughout pretrial and discovery proceedings. *See generally* I R. 115-116. On July 18, 1974, they filed a Suggestion to Dismiss, stating that the pleadings and depositions on file showed on their face "that the controversy described therein is one within the exclusive jurisdiction of an arbitrator" under the contract's arbitration clause. In the brief supporting this suggestion defendants conceded that Local 1340 was subject to the agreement's terms and that local "would be bound by an arbitral award" issued in accordance with them. But defendants made no motion to stay the court proceedings (*see* Brief of Appellants at 29 n.25), and no motion for an order directing plaintiff to arbitrate.[5] Their apparently changed

[4a]Defendants in their answer also pleaded an Eighth Affirmative Defense (II R. 126) in which they stated that:

> The defendants . . . , without waiving their contention that the interpretation and application of the provisions of the aforementioned collective bargaining agreement is within the sole and exclusive province of the disputes resolution machinery agreed to therein, assert that they have neither waived their right, nor the right of the employees they represent, to honor a picket line established by another labor organization.

[5]With respect to whether plaintiff Burton was misled into thinking the defendants would not ask for an order for arbitration, a point discussed further below, we note that in a written reply on August 2, 1974, to the defendants' Suggestion to Dismiss, plaintiff Burton did criticize the defendants' temerity at that late hour to suggest that "the court cannot further proceed in this action *and must order arbitration.*" (III R. 210). (Emphasis added). However, the Suggestion itself and the exchanges between the parties dealt mainly with the request to dismiss the action and the defendants' Suggestion and brief do not actually seek an order for arbitration.

position was "further obfuscated," the trial judge said (I R. 91); the judge noted that five days later in their amended pretrial statement defendants pleaded that "the Defendant Local 1340 is not a party to the aforementioned collective bargaining agreement with plaintiff." (I R. 91).

The case proceeded to trial on October 1, 1974. During trial, defense counsel questioned Mr. Burton to establish the point that he had not sought arbitration under the contract. The court then asked defense counsel if he would agree that he would arbitrate the question of damages and be bound by it, and counsel so agreed. The judge then referred to the loss of time and expense to the parties and loss of the court's time. (IV R. 49-51). Counsel further responded to questions by the court that defendants did demand arbitration, and that arbitration should be ordered under *Boys Market, Inc. v. Retail Clerks Union*, 398 U.S. 235. (*Id.* at 111).

Later in the trial in response to further questioning by the court defense counsel admitted that he first requested, by mandatory injunction, an order for plaintiff to arbitrate "when requested to do so today." (IV R. 140.) Defense counsel maintained, however, that defendants' position since filing of the answers had been that the appropriate forum was arbitration. (*Id.* at 142).

Because of the time already invested in the case and because of his view that defendants should not be permitted to frustrate the judicial process at that late date, the judge went ahead with the trial. During the trial, evidence was presented on the issues of breach of the no-strike clause, damages, various defenses and the relationship of the union organizations.

Subsequently, the trial judge issued the original opinion in which he held, *inter alia*, that the dispute itself was arbitrable. (III R. 314). In addition, relying on *Operating Engineers Local 150 v. Flair Builders*, 406 U.S. 487 (1972), he held that the preliminary question whether defendants had not

waived their right to arbitration by "evasive and dilatory" brief and pleading tactics in the district court should properly be decided by an arbitrator. (*Id.*). He ordered a stay of the district court proceedings, then later, upon plaintiff's motion, dismissed the suit altogether so that plaintiff might perfect an appeal. (III R. 315, 320).

In the first appeal, see *Reid Burton Construction v. Carpenters District Council of Southern Colorado*, 535 F.2d 598, *cert. denied*, 429 U.S. 907 (1976), we upheld the trial court's determination that the dispute was properly arbitrable under the terms of the contract, but found that when the actions premising plaintiff's equitable defense to defendants' asserted arbitration right occurred solely before the court, it was improper to have given the arbitrator the equitable preliminary issues to decide. Accordingly, we remanded the case to the district court for determination of whether defendants, by evasive and dilatory pleading practices before that court, were prevented from asserting any right they may have had to arbitration.[6]

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[6]In that first appeal we stated (535 F.2d at 604):

> It is entirely appropriate in some instances for a district court to retain section 301 jurisdiction of an arbitrable dispute where, because of conduct before the court, it may be deemed that a party is prevented on the basis of some equitable principle from asserting a right to arbitration. Whether the instant case is one such instance has not been decided. Therefore, we remand this case for such a determination. If the district court finds that there has been no estoppel or waiver because of the unions' conduct in pleading, then it is proper to order arbitration of the underlying dispute — the alleged violation of the no-strike clause. If on the other hand it is determined that the unions have waived their right to arbitration, or in some other way should be prevented from asserting this right, because of conduct which falls within the control of the court, then the district court can properly proceed to the merits of the underlying dispute.

On remand the district court found that defendants' conduct in court established an equitable defense to defendants' arbitration right and entered judgment for plaintiff for the predetermined[7] $10,801.97 in damages, plus interest and costs. Reiterating his views that he took a "dim view of defendants' whirlygig positions during the course of the litigation" and that "such sophistry as [defendants] does not help a court in its futile efforts to keep up with an overcrowded docket," the district judge found that "advertently or inadvertently the court and plaintiff's counsel were led down a primrose path by a failure on the part of defendants' counsel to communicate to the court and opposing counsel in a timely way the argument of defendants that the dispute was one subject to arbitration." (I R. 86). Having found that *"defendants acquiesced in setting the case for trial"* and that "their pretrial statement cheerfully estimated the length of trial to be held" (I R. 90), the court noted that even after their suggestion to dismiss "defendants made no offer to obtain nor did they agree to submit to binding arbitration." (I R. 92) (Emphasis added).

Though observing that "the unfortunate results may have been largely inadvertent rather than intentional" (I R. 93), the court found that the "impact on the court and on plaintiff were the same no matter what the intent of defense

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[6]Continued

> In sum we conclude that the enumerated equitable defenses discussed are, in general, mandated by *Flair Builders* to the arbitrator for determination of the continued vitality of the contractual arbitration process. However, if such defenses arise solely during the course of the judicial process the arbitrator is not the one to determine whether the judicial process has been abused by either party or at all or whether an equitable defense to the main dispute has been established during the course of the judicial trial by in-trial conduct.

[7]The trial judge had already made findings on damages before the first appeal. (*See*, III R. 312-13). These findings are not challenged in the second appeal.

counsel. The pleadings and briefs filed for defendants were evasive and dilatory, and whether they were so because of intent or as a result of negligence, plaintiff and the court were lulled into a belief that defendants wanted the court to try the lawsuit, and that's what the court did." (*Id.*).

Finally, noting that "[t]he unions played games with plaintiff and the court too long to now insist on an injunctive order requiring plaintiff to arbitrate this stale dispute," the court concluded that "the record in this case demonstrates that the conduct of defendants *in this case in this court* establish the equitable defenses to arbitration mentioned by Chief Judge Lewis." (*Id.*).

This timely appeal follows, and we focus mainly on the findings and the holding against defendants' right to arbitration.

II

In urging reversal of the district court, defendants argue that they did not waive their right to assert the arbitration defense either by not moving for a stay or by participating in the litigation. More specifically, defendants contend that they raised their arbitration defense in a timely and proper fashion and without intentional misrepresentation of Local 1340's contract status; that the initial denial of Local's party status was made in good faith; and that, in any event, Burton has suffered no prejudice from the delay in demanding arbitration. Mere delay, they say, does not constitute waiver, absent such a showing of prejudice; defendants were not obligated to move for a stay; and the mere filing of a counter-claim does not waive the defense.

Defendants further contend that since alternative pleading is proper, a party need not rely exclusively upon the arbitration provisions of the contract, but may also seek damages for breach in the same action. It is not the inconsistency of these pleadings, but rather any prejudice flowing

therefrom, which determines the waiver issue. Thus "the counterclaim, rather than abandoning the arbitration defense, underscored its presence as an important element in the action."

We cannot agree that these points call for reversal of the trial court's findings. Generally, the parties to a contract can agree to settle disputes arising thereunder by arbitration. Indeed, the federal policy is to promote industrial stabilization through the collective bargaining agreement, and a major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the agreement. *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578. However, the right to arbitration, like any other contract right, can be waived. *Cornell & Company v. Barber & Ross Company*, 360 F.2d 512, 513 (D.C. Cir.), *aff'g.*, 242 F. Supp. 825 (D.D.C.). There is no set rule as to what constitutes a waiver or abandonment of the arbitration agreement; the question depends upon the facts of each case and usually calls for a finding by the trier of the facts. *Burton-Dixie Corp. v. Timothy McCarthy Const. Co.*, 436 F.2d 405, 408 (5th Cir.).

In determining whether a party to an arbitration agreement, usually a defendant, has waived its arbitration right, federal courts typically have looked to whether the party has actually participated in the lawsuit or has taken other action inconsistent with his right, *Cornell & Company v. Barber & Ross Company, supra*, 360 F.2d at 513; whether the litigation machinery has been substantially invoked and the parties were well into preparation of a lawsuit by the time an intention to arbitrate was communicated by the defendant to the plaintiff, *Cornell & Company*, 242 F.Supp. at 826 (D.C.C.), *aff'd*, 360 F.2d 512; whether there has been a long delay in seeking a stay or whether the enforcement of arbitration was brought up when trial was near at hand, *General Guaranty Ins. Co. v. New Orleans General Agency, Inc.*, 427 F.2d 924, 928 n.4 (5th Cir.); *Robert Lawrence Company v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 413 (2d Cir.), *cert. dismissed*, 364

U.S. 801; *American Locomotive Co. v. Chemical Research Corp.*, 171 F.2d 115, 121 (6th Cir.), *cert. denied*, 336 U.S. 909; *E.T. Simonds Const. Co. v. Local 1330 of Int. Hod Carriers, etc.*, 315 F.2d 291 (7th Cir.); *Radiator Specialty Co. v. Cannon Mills*, 97 F.2d 318 (4th Cir.).

Other relevant factors are whether the defendants have invoked the jurisdiction of the court by filing a counterclaim without asking for a stay of the proceedings, *American Locomotive Co. v. Chemical Research Corp., supra*, 171 F.2d at 121; *Radiator Specialty Co. v. Cannon Mills, supra*, 97 F.2d at 319; *Hilti, Inc. v. Oldach*, 392 F.2d 368, 370-71, 372 n.9 [*e.g.*, taking advantage of judicial discovery procedures not available in arbitration, *see Carcich v. Rederi A/B Nordie*, 389 F.2d 692, 696 n.7 (2d Cir.)] had taken place, *Kulukandis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 989 (2d Cir.); and whether the other party was affected, misled, or prejudiced by the delay, *Kulukandis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978; *Local 198, United Rubber, C. L. & P. Wkrs. v. Interco, Inc.*, 415 F.2d 1208, 1211-12 (8th Cir.); *Carcich v. Rederi A/B Nordie, supra*, 389 F.2d at 696.

In *Burton-Dixie, supra*, the Fifth Circuit confronted the waiver issue in a context substantially similar to the present one. There defendant in its answer did not ask the court to stay proceedings pending arbitration, but rather denied liability, set up as an affirmative defense plaintiff's failure to arbitrate, impleaded two third-party defendants, and proceeded to litigate the substantive dispute. The court concluded that the factfinder (there a jury) could reasonably find that defendant waived its right to insist on arbitration. *Id.*, 436 F.2d at 409; *see also American Locomotive, supra*, at 115.

Viewed against the above principles and decisions, we cannot say that the finding of waiver by defendants District Council and Local 1340 was clearly erroneous. We note the initial and consistent denial for one year of Local's status as a party; the ambiguous or confusing ultimate stance on this

point; defendants' participation in numerous hearings, pretrial conferences, motions and other pleadings, and the deposing of witnesses; and their assertion of the arbitration clause merely as a defense in bar and a counterclaim, without insisting upon or demanding immediately, as was their duty, *see Radiator Specialty*, 97 F.2d at 319, enforcement of that provision.

Among other things, the defendants-appellants argue that there was no prejudice to Burton resulting from their actions in court. While it is true that the trial court made no specific finding of prejudice, the sum and substance of those findings as a whole is one of prejudice and detriment to Burton. Admittedly it was not until the day of trial when mandatory injunctive relief was requested by defendants, which clearly signaled their position that they desired the decision of an arbitrator instead of the court. The preparations until that time for trial in the court do, in our opinion, amount to sufficient prejudice that it is inequitable for a party at that point to shunt the controversy over to the arbitration procedures. See *American Locomotive Co. v. Chemical Research Corp., supra*, 171 F.2d at 121.[8]

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[8]In *American Locomotive, supra*, 171 F.2d 115, the defendants filed an answer and counterclaim denying the material allegations of the complaint; set up six special defenses, one of which pleaded the arbitration clause as a bar to plaintiff's action; declined to move for a stay at the outset; and participated in extensive proceedings in the case, including pleadings, motions, agreed orders, and expensive discovery procedures, before insisting on arbitration.

We have noted *Controlled Sanitation Corp. v. Machinists District 128*, 524 F.2d 1324 (3d Cir.), *cert denied*, 424 U.S. 915, but doubt the persuaveness of the majority position there. In any event the case seems distinguishable. The majority opinion there noted specifically, *id.* at 1326 n.3, that while the unions had taken a position that there was no collective bargaining agreement, they clearly reserved the right that the dispute should be submitted to arbitration, should the court find otherwise. That is not the case here. While the defendants were asserting their changing positions concerning the agreement they did not, until the day of trial, assert as either a primary or alternative position a request for a stay or for an order for arbitration.

The findings of the trial court on the defendants' conduct must be accepted unless they are clearly erroneous. *See Sheet Metal Wkrs. Int. Ass'n V. Los Alamos Const.*, 550 F.2d 1258, 1265 (10th Cir.). We conclude that the court's findings here were not clearly erroneous and that its holding that defendants' conduct in the court proceedings prevented assertion of their arbitration right was not in error. Accordingly, the judgment is

AFFIRMED.

APPENDIX C

SELECTED PLEADINGS[1]

I. Respondent Burton's Complaint for Damages and Injunction (July 13, 1973)

COMES NOW the Plaintiff, Reid Burton Construction, Inc., by its attorneys, Law Offices of Robert G. Good, Denver, Colorado, and for a cause of action against Defendants alleges and states as follows:

1. Plaintiff is a corporation organized under and existing by virtue of the laws of the State of Colorado, with principal office and place of business at Fort Collins, Colorado.

2. Defendants, and each of them, are labor organizations within the meaning of the National Labor Relations Act, as amended, 29 U.S.C. §151, et seq. Defendant Local 1340 has its principal office at Fort Collins, Colorado, Defendant Carpenters District Council of Southern Colorado has its principal office at Colorado Springs, Colorado, and Defendant Colorado Building and Construction Trades Council has its principal office at Denver, Colorado.

3. Defendants, and each of them, represent employees in an industry affecting commerce and Plaintiff is an employer in an industry affecting commerce, as that term is defined in the National Labor Relations Act, 29 U.S.C. §152.

4. Jurisdiction over this action is granted the Court by the provisions of 29 U.S.C. §185.

5. Plaintiff and Defendants, Carpenters District Council of Southern Colorado and Local 1340 of the International

[1]Relevant pleadings, or portions thereof, are included in Appendix C, Respondent has deleted party captions, signatures, signature pages and certificates of service. The pleading was filed in the United States District Court for the District of Colorado on the date following the caption of the pleading.

Brotherhood of Carpenters and Joiners of America, AFL-CIO, are parties to a collective bargaining agreement known as "Carpenters' Agreement, Carpenters District Council of Southern Colorado." At all times material herein such collective bargaining agreement was in full force and effect and governed the relationship between the aforementioned parties.

6. Said collective bargaining agreement contains promises by Local 1340 and by the Carpenters District Council of Southern Colorado that they and their members will not strike or picket the Plaintiff during the term of the agreement. Said collective bargaining agreement further defines the relationship of the Plaintiff to Plaintiff's contractors or subcontractors on construction sites in so far as all the requirements, conditions and intents of the said collective bargaining agreement applies to said contractors or subcontractors of Plaintiff.

7. Defendant, Colorado Building and Construction Trades Council, is an unincorporated association and an amalgamation of numerous labor organizations in the building and construction industry in the State of Colorado, including Defendant Local 1340 and Defendant Carpenters District Council of Southern Colorado. Defendant Colorado Building and Construction Trades Council is authorized by its constituent unions, including Defendant Local 1340 and Defendant Carpenters District Council of Southern Colorado, to represent them for purposes relating to labor relations, and as such the Defendant Colorado Building and Construction Trades Council is an agent of its constituent unions.

8. On or about February 25, 1973, a representative of Defendant Colorado Building and Construction Trades Council, submitted to Plaintiff herein for its requested signature a labor agreement which would require, inter alia, that Plaintiff contract only with union subcontractors in the future on all its construction sites, which union subcontractors must have signed union agreements with the various construction trades, including subcontractors performing carpenter work.

9. When Plaintiff refused to sign the labor agreement described above in paragraph eight, Defendant Colorado Building and Construction Trades Council commenced picketing a Fort Collins construction site of Plaintiff on or about March 8, 1973 and continued to do so until on or about March 16, 1973. On or about April 3, 1973, and continuing to on or about April 13, 1973, such picketing was resumed by Defendant Colorado Building and Construction Trades Council where the object thereof was to force Plaintiff to sign the submitted labor agreement.

10. The picketing described above in paragraph nine was implicitly and/or expressly authorized by and/or ratified by the constituent labor organizations which are members of the Colorado Building and Construction Trades Council, including Defendants Local 1340 and Defendant Carpenters District Council of Southern Colorado, and at all times Defendant Colorado Building and Construction Trades Council was acting within the scope of its authority from its members.

11. During the period of the picketing described above in paragraph nine, Defendant Local 1340 and Defendant Carpenters District Council of Southern Colorado, by its representatives, induced, encouraged or coerced its employee members to cease performing work for Plaintiff on the subject construction site and otherwise endorsed, enforced and supported the picket of Defendant Colorado Building and Construction Trades Council.

12. The picketing of Defendant Colorado Building and Construction Trades Council, as described above in paragraph nine, resulted in Plaintiff's construction site being temporarily shut down in whole or in part during the period of said picketing, thus subjecting Plaintiff to monetary losses in the approximate amount of $1,000.00 per day, which amount cannot be definitely ascertained at this time, but will be at the time of trial of this cause.

13. The labor agreement submitted for signature by Defendant Colorado Building and Construction Trades Council, as agent for Defendant Local 1340 and Defendant Carpenters District Council of Southern Colorado, among others, would require Plaintiff to conduct his business at its construction sites relative to labor relations in a manner that is not required under its existing agreement with Defendant Local 1340 and Defendant Carpenters District Council of Southern Colorado. By the action of the Defendant Colorado Building and Construction Trades Council as agent for Defendant Local 1340 and Defendant Carpenters District Council of Southern Colorado, the two aforementioned Carpenter Defendants are attempting to change the provisions of their existing collective bargaining agreement and thus have violated the terms of that agreement and have caused Plaintiff damages in their attempt to make such change.

14. The action of Defendant Local 1340 and Defendant Carpenters District Council of Southern Colorado in endorsing and supporting the picket line established by its agent, Defendant Colorado Building and Construction Trades Council, and the action of the two Carpenter Defendants aforementioned in inducing and encouraging and/or coercing its members to refuse to work for Plaintiff, also constitutes a breach of their contract promises not to strike or picket Plaintiff during the term of their collective bargaining agreement. By such action, the two Carpenter Defendants further contributed to the damages suffered by Plaintiff as described above.

15. Defendant Colorado Building and Construction Trades Council, by its representatives, continues to request Plaintiff to sign its labor agreement as described above, and continues to threaten to picket Plaintiff as done previously where the object thereof is to force Plaintiff to sign said agreement and it can be reasonably anticipated that unless enjoined, Defendant Colorado Building and Construction Trades Council, as agent for the two Carpenter Defendants herein, will continue to do so.

WHEREFORE, Plaintiff prays this Honorable Court to enter judgment in favor of Plaintiff against all Defendants jointly and severally, in the approximate amount of $16,000.00 to compensate Plaintiff for its monetary losses during said picketing, such amount to be more definitely ascertained at the time of the trial of this action. The Court is further requested to enter an order forever restraining Defendant Colorado Building and Construction Trades Council, as agent for the two Carpenter Defendants herein, from picketing Plaintiff where the object thereof is to force or require Plaintiff to sign the aforementioned labor agreement; the Court is further requested to restrain Defendant Local 1340 and Defendant Carpenters District Council of Southern Colorado from authorizing the Defendant Building Trades Council to picket Plaintiff or to solicit Plaintiff's signature on the subject labor agreement, and from supporting and endorsing the picket line of Defendant Building Trades Council and from inducing, encouraging and/or coercing their members to respect the picket line of said Building Trades Council.

FURTHER, this Court is urged to award Plaintiff reasonable attorney's fees, costs, interest, and such other and further relief as this Court may deem proper.

II. Excerpts from Respondent Burton's Amended Complaint (September 14, 1973)

COMES NOW the Plaintiff, Reid Burton Construction Inc., by its attorneys, Law Offices of Robert G. Good, Denver, Colorado, and for a cause of action against Defendants alleges and states as follows:

* * * * * *

5. Plaintiff and Defendants, Carpenters District Council of Southern Colorado and Local 1340 of the International Brotherhood of Carpenters and Joiners of America, AFL-CIO, are parties to a collective bargaining agreement known as "Carpenters' Agreement, Carpenters District Council of

Southern Colorado." At all times material herein such collective bargaining agreement was in full force and effect and governed the relationship between the aforementioned parties.

III. Excerpts from Petitioners' Answer and Counterclaim (November 9, 1973)

ANSWER

COMES NOW the defendants, Carpenters District Council of Southern Colorado and Local 1340 of International Brotherhood of Carpenters and Joiners of America, by their attorneys, Hemminger, McKendree, Vamos & Elliott, P.C., and file the within Answer and Counterclaim to the Amended Complaint in this matter as follows:

* * * * *

5. The above named defendants deny the allegations contained in paragraph 5 of the Amended Complaint. By way of further answer, the above named defendants aver that plaintiff and defendant Carpenters District Council of Southern Colorado are parties to a collective bargaining agreement known as "Carpenters Building Construction 1972-75 Agreement" effective May 1, 1973 until April 30, 1975. Defendant Local 1340 is not a party to the aforementioned collective bargaining agreement.

* * * * *

COUNTERCLAIM

1. Defendant Carpenters District Council of Southern Colorado is a labor organization within the meaning of the National Labor Relations Act, as amended, 29 U.S.C. §151, et seq., is an unincorporated association, and has its principal office in Colorado Springs, Colorado.

2. Defendant Carpenters District Council of Southern Colorado represents employees in an industry affecting commerce and plaintiff is an employer in an industry affecting commerce, as that term is defined in the National Labor Relations Act, as amended, 29 U.S.C. §152.

3. Plaintiff is a corporation organized under and existing by virtue of the laws of the State of Colorado with principal office and place of business at Fort Collins, Colorado.

4. Jurisdiction over this Counterclaim is granted the Court by the provisions of 29 U.S.C. §185.

5. Plaintiff and defendant Carpenters District Council of Southern Colorado are parties to a collective bargaining agreement known as "Carpenters Building Construction 1972-75 Agreement" effective May 1, 1972 to, through, and including April 30, 1975.

6. Said collective bargaining agreement provides in Article XIII entitled "Contractural [sic] Disputes" a mandatory dispute settlement procedure culminating in a Board of Adjustment hearing and selection of an impartial chairman. Said Board of Adjustment has final and binding authority to resolve disputes involving the application or interpretation of the terms of said agreement.

7. A dispute involving the application or interpretation of the above mentioned agreement within the meaning of Article XIII, Section 1 of said agreement has arisen between the plaintiff and defendant Carpenters District Council of Southern Colorado in that plaintiff alleges in its Amended Complaint that said defendant has violated Article XIII, Section 5 pertaining to strikes, work stoppages, etc. and Article IV pertaining to subcontracts.

8. In accordance with Article XIII of the above mentioned collective bargaining agreement, plaintiff has a mandatory obligation at the time the above described dispute

arose to utilize the dispute settlement procedures provided for in said article, and the plaintiff's failure to abide by the terms of said article constitute an express violation of said collective bargaining agreement, thereby giving rise to the express right in the defendant Carpenters District Council of Southern Colorado to take appropriate economic action against the plaintiff.

9. By commencing the within lawsuit against defendants Carpenters District Council of Southern Colorado and Local 1340 for breach of their contractual promises not to strike and for violating their agreement by attempting to change the provisions of Article IV entitled "Sub-contractors" of the above mentioned collective bargaining agreement, the plaintiff has flagrantly disregarded its mandatory obligation to abide by the contractual dispute settlement procedures set forth in said collective bargaining agreement, and the plaintiff violated the express terms of Article XIII of said collective bargaining agreement.

10. As a proximate result of plaintiff's above described breach of the above mentioned collective bargaining agreement, the defendant has suffered damages including, inter alia, the cost of defending the within lawsuit.

WHEREFORE, defendant Carpenters District Council of Southern Colorado prays that this Honorable Court grant the following relief:

1. That judgment be entered in favor of the defendant Carpenters District Council of Southern Colorado against the plaintiff and that the defendant be awarded all costs incurred, including reasonable attorney's fees, in defending the within lawsuit.

2. That the Court award defendant such other and further relief as this Court may deem proper.

IV. Excerpts from Respondents' Reply to Counterclaim (December 5, 1973)

SECOND DEFENSE

As a further defense to Defendants' Counterclaim, Plaintiff affirmatively alleges that Defendants have waived any right they may have to make the instant Counterclaim and Defendants are thereby estopped from doing so by their conduct.

FIFTH DEFENSE

As a further defense to Defendants' Counterclaim, Plaintiff affirmatively alleges that Defendants' Counterclaim is barred by the application of the doctrine of laches.

V. Excerpts from Petitioners' Amended Answer and Counterclaim (March 11, 1974)

COME NOW the defendants, Carpenters District Council of Southern Colorado and Local 1340 of the International Brotherhood of Carpenters and Joiners of America, by their attorneys, Hemminger, McKendree, Vamos & Elliott, P.C., and file the within Amended Answer and Counterclaim to the Amended Complaint in this matter as follows:

* * * * *

5. The above named defendants deny the allegations contained in paragraph 5 of the Amended Complaint. By way of further answer, the above named defendants aver that plaintiff and defendant Carpenters District Council of Southern Colorado are parties to a collective bargaining agreement known as "Carpenters Building Construction 1972-75 Agreement" effective May 1, 1973 until April 30, 1975. Defendant Local 1340 is not a party to the aforementioned collective bargaining agreement.

VI. Excerpts from Petitioners' Pre-Trial Statement (March 11, 1974)

* * * * *

5. (A) GENERAL NATURE OF THE CLAIMS OF THE PARTIES

b. Defendants' Claim

The Plaintiff contends that the Defendant Carpenters' unions have a labor agreement with the Plaintiff which contains a promise not to strike or picket the Plaintiff and that said promise was violated by the picketing of the Colorado Building Construction Trades Council in March and April, 1973 because the Trades Council was acting as the agent of the Carpenter Defendants at this time. In addition, the Plaintiff also contends that the Carpenter Defendants coerced their members into not working for Plaintiff during this same period and thereby directly violated the no-strike promises contained in the collective bargaining agreement with the Plaintiff.

The Defendant Carpenter unions deny Plaintiff's allegation of direct and indirect violation of the Carpenters' collective bargaining agreement, which is known as the "Carpenters' Building Construction 1972-75 Agreement." It is the Defendant Carpenter unions' position that the Colorado Building Construction Trades Council is a separate and distinct labor organization with its own purposes and goals and that in submitting its own subcontract agreement to the Plaintiff for signature and in conducting picketing against Plaintiff in March and April, 1973, the Colorado Building Construction Trades Council was acting on its own initiative pursuing its own goals and was not acting as the agent of the Carpenter Defendants herein. The Defendant Carpenters District Council of Southern Colorado is a party to the aforementioned collective bargaining agreement with the Plaintiff, but is not a member of the Colorado Building Construction

Trades Council and, therefore, has no agency relationship to the Trades Council. On the other hand, Defendant Local 1340 is an affiliate of the Colorado Building Construction Trades Council, but neither it nor the Defendant Carpenters District Council of Southern Colorado authorized or ratified the Trades Council picketing. Furthermore, the Defendant Local 1340 is not a party to the aforementioned collective bargaining agreement with the Plaintiff.

* * * * *

(B) UNCONTROVERTED FACTS

The Defendants above-named contend that the following facts are uncontroverted:

1. Plaintiff and Defendant Carpenters District Council of Southern Colorado are parties to the collective bargaining agreement known as "Carpenters' Building Construction 1972-75 Agreement."

* * * * *

5. Defendant Local 1340 is not a party to the aforementioned collective bargaining agreement, whereas Carpenters District Council of Southern Colorado is a party to said agreement.

VII. Petitioners' Suggestion to Dismiss Pursuant to Rule 12(h)(3) (July 18, 1974)

COME NOW the Defendants, Carpenters District Council of Southern Colorado and Local 1340 of the International Brotherhood of Carpenters and Joiners of America, and move this Honorable Court to Dismiss the above-captioned Action on the grounds that the Court lacks jurisdiction over the subject matter because the Pleadings and the Depositions on file show on their face that the controversy described therein is one within the exclusive jurisdiction of an arbitrator selected

and acting pursuant to the provisions of Article XIII of the collective bargaining agreement upon which this Action is based.

VIII. Excerpts from Petitioners' Brief in Support of Suggestion to Dismiss Pursuant to Rule 12(h) (3) (July 18, 1974)

PRELIMINARY STATEMENT

COME NOW the Defendants, Carpenters District Council of Southern Colorado and Local 1340 of the International Brotherhood of Carpenters and Joiners of America, by and through its attorneys, the LAW OFFICES OF JOHN W. McKENDREE, and suggest pursuant to Rule 12(h)(3) of the Fed.R.Civ.P. that this Court is without jurisdiction over the subject matter of the within controversy and hence should Order dismissal of the Action. Bank, v. U.S., 16 F.R.D. 310, 312-313 (S.D. Calif. 1954). See also Arcaya v. Estrada, 24 F.R.Serv. 12 h.234, Case 1 (S.D.N.Y. 1957).

ARGUMENT

THE COURT DOES NOT HAVE SUBJECT MATTER JURISDICTION OVER THE INSTANT DISPUTE BECAUSE: (1) THE DISPUTE IS SUBSTANTIVELY ARBITRABLE; (2) THE FINAL AND BINDING ARBITRATION PROCEDURES PROVIDED FOR IN THE COLLECTIVE BARGAINING AGREEMENT ARE AVAILABLE TO THE PLAINTIFF; and (3) THE PLAINTIFF FAILED TO UTILIZE SUCH PROCEDURES BEFORE INSTITUTION OF THE PRESENT ACTION.

* * * * *

Although heretofore the Defendants have questioned whether the Defendant Local 1340 was a party to the collective bargaining agreement entered into by Reid Burton and the Carpenters District Council of Southern Colorado, the Defendants herein

state that Local 1340 is subject to the terms and provisions of the agreement. Consolidation Coal Co. v. United Mine Workers, Local 5869, 362 F.Supp. 1073 (S.D.W.Va. 1973). As a consequence, both Defendant Carpenters District Council of Southern Colorado and Defendant Local 1340 would be bound by an arbitral award issued in accordance with the provisions of Article XIII of the collective bargaining agreement.

IX. Excerpts from Respondent's Reply to Petitioners' Suggestion To Dismiss and Motion for All Costs and Fees (August 2, 1974)

II. PLAINTIFF REID BURTON'S POSITION

The position of Plaintiff Reid Burton in response to the "Suggestion to Dismiss" is three-fold:

1. Under United States Supreme Court decisions, this Court still has jurisdiction of the subject matter.

2. In the event this Court grants the "Suggestion to Dismiss" for lack of jurisdiction over the subject matter, this Court must award damages (including *inter alia*, costs of suit, attorney fees, witness fees and deposition costs) to Plaintiff and its representatives, and to other parties, and to the Court itself, for the time and effort thus far wasted by all concerned. Therefore, this Court is requested to order a hearing on every penny of damages arising out of the evasive and dilatory procedural and substantive legal gymnastics of the Defendant Unions.

3. In the event the Court agrees with Plaintiff that it still retains subject matter jurisdiction, the Court should order an award of attorney's fees and costs to the Plaintiff Company for the time its attorneys have spent in responding to the instant "Suggestion to Dismiss."

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

REID BURTON CONSTRUCTION, INC., a Colorado corporation, Plaintiff, vs. CARPENTERS DISTRICT COUNCIL OF SOUTHERN COLORADO, LOCAL 1340 of the UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AFL-CIO, COLORADO BUILDING AND CONSTRUCTION TRADES COUNCIL, unincorporated associations and labor organizations, Defendants.	)	CIVIL ACTION NO. C-5184

MEMORANDUM OPINION

WINNER, Judge

By amended complaint brought under 29 U.S.C. §185, plaintiff sought damages against (a) Carpenters District Council of Southern Colorado, (b) Local 1340 of the International Brotherhood of Carpenters & Joiners of America, AFL-CIO, and (c) Colorado Building and Construction Trades Council. The amended complaint alleged in material part:

"5. Plaintiff and Defendants, Carpenters District Council of Southern Colorado and Local 1340 of the International Brotherhood of Carpenters and Joiners of America, AFL-CIO, are parties to a collective bargaining agreement known as 'Carpenters' agreement, Carpenters District Council of Southern Colorado.' *At all times material herein such collective bargaining agreement was in full force and effect and governed the relationship between the aforementioned parties.* [emphasis supplied].

"6. Said collective bargaining agreement contains promises by Local 1340 and by the Carpenters District Council of Southern Colorado and (sic) they and their members will not strike or picket during the term of the agreement . . . .

"7. . . . Defendant Colorado Building and Construction Trades Council is authorized by its constituent unions, including Defendant Local 1340 and Defendant Carpenters District Council of Southern Colorado, to represent them for purposes relating to labor relations, and as such the Defendant Colorado Building and Construction Trades Council is an agent of its constituent unions."

By order of November 23, 1973, Colorado Building and Construction Trades Council was dismissed from the case under rules of contract and agency law, because, "Under the averments of the complaint here, and taking into account the actual parties to the contract, it can be said that Colorado Building and Construction Trades Council is concerned with this dispute only as an agent for a disclosed principal."

The other two defendants answered, and in paragraph 5 of the amended answer it is said:

"5. *The above named defendants deny the allegations in paragraph 5 of the Amended Complaint.* By way of

> further answer, the above named defendants aver that plaintiff and defendant District Council of Southern Colorado, the Defendants herein state that Local 1340 is subject to the terms and provisions of the agreement. . . . As a consequence, both Defendant Carpenters District Council of Southern Colorado and Defendant Local 1340 would be bound by an arbitral award issued in accordance with the provisions of Article XIII of the collective bargaining agreement."

July 10, 1974, the Local said that it *is* bound by the contract and that the dispute is subject to arbitration and that the case should be dismissed. Defendants argue that they have not changed their position, and they explain that the time spent by plaintiff's counsel and the court in preparing the case for trial was wasted time because plaintiff's counsel and the court should have read more literally defendants' assertions that Local 1340 was not a party to the contract and should not have been taken aback by defendants' July 10, 1974, assertion that the non-party local was bound by a contract to which it is not a party, and this even though defendants had denied that they were governed by the agreement. I have said on the record and I repeat here that sophistry such as this does not help a court in its futile efforts to keep up with an over-crowded docket.

Another pretrial conference was held after the suggestion to dismiss was filed, and the pretrial order contains the following partial statement of defendants' position as to the court's jurisdiction:

> "Although the Defendant Carpenters District Council of Southern Colorado and Defendant Local 1340 submit that this Court does not have jurisdiction under Section 301 to reach the merits of the Plaintiff's claims for breach of contract, this Court does have threshold jurisdiction under Section 301 to determine whether the provisions of Article XIII of

the collective bargaining agreement provide for final and binding arbitration of the subject matter of Plaintiff's claim. Threshold jurisdiction for this determination lies under Section 301 because Plaintiff's claim involves an alleged violation of a contract between an employer and a labor organization. Furthermore the stance that the existence of applicable arbitration provisions deprives this Court of subject matter jurisdiction is not inconsistent with the stance that the Court has threshold jurisdiction under Section 301. Simply stated, the Court has jurisdiction to determine whether the Plaintiff's claims of breach of contract are substantively arbitrable, but once such claims are determined to be substantively arbitrable, the jurisdictional grant of authority under Section 301 ceases."

With this latest version of defendants' ever changing position being filed a scant week in advance of the trial date, the case proceeded to trial on all issues, the case was taken under advisement and post trial briefs were allowed. They have been filed, and, having been beleagured by this case to the extent that I have, I shall make findings and conclusions on all questions directly or indirectly, and properly or improperly before me. I do this to avoid if possible any risk of having to try the case all over again if the Court of Appeals disagrees with my conclusions.

Plaintiff and Carpenters District Council of Southern Colorado are parties to a labor contract, and defendant Local 1340 of the United Brotherhood of Carpenters & Joiners of America, AFL-CIO has now made a judicial admission that it is bound by that contract. Article XIII of the contract is the important article here. It provides in material part:

"ARTICLE XIII

"CONTRACTURAL DISPUTES

"Section 1 — In the event that a dispute arises involving the application or interpretation of the terms of this agreement, reasonable and diligent effort shall be exerted by the employee with the employer's representative, the employee contacting the business representative through the steward, and/or the business representative with the employer's representative. If the two parties are unable to reach a settlement, the dispute shall be reduced to writing and the aggrieved party shall notify the other party the dispute is being referred to a Board of Adjustment.

"Section 2 —The Board of Adjustment shall be composed of two representatives selected by the employer from contractors signatory to this agreement and two representatives selected by the union. The Board of Adjustment shall meet not later than five (5) working days after a grievance has been presented to it.

"Should the Board of Adjustment be unable to render a majority decision after convening and hearing the dispute, the Board shall, within 48 hours, select an impartial chairman who is not directly connected with the building or construction industry, either as contractor or union. Should the parties be unable to agree on the selection of the chairman within said 48 hours, the same shall be selected from a panel of five (5) names submitted by the director of the Federal Mediation and Conciliation Service in Washington, D.C. The party initiating the dispute shall strike first on said list.

"**Section 3** — The majority decision of the Board of Adjustment shall be final and binding upon each party to the dispute in each instance and shall be within the scope and terms of this agreement.

. . . . . .

"**Section 5** — The parties agree that there shall be no strike, work stoppage, slowdown, lockout or other interruption of the continuity of the work in progress during the life of this Agreement unless a party refuses to abide by or to implement the majority decision of the Board of Adjustment."

While the contract was in full force and effect, and while plaintiff was living up to all of its terms, Colorado Building and Construction Trades Council wrote a letter to plaintiff which said:

"Gentlemen:

"We are presently engaged in a program to standardize wages and working conditions in the construction industry in this area. To assist in accomplishing this, we are requesting builders and general contractors to sub-contract jobsite work only to contractors who are parties to a contract with one of the unions affiliated with our council. A proposed draft of such agreement is enclosed for your consideration. You will note that it applies only to future work for which no sub-contract has been executed. Your signing of the proposed agreement would therefore not require you to terminate the services of any contractor for any job which is already under contract.

"We intend to acquaint the public, by means of picketing and other forms of communication, with

the names of builders and general contractors who do not enter into our sub-contracting agreement. In the event that your company is the subject of such picketing, it will be conducted at your general offices and other places in which you may be engaged in business. The picketing will be directed to the public, and not to your contractors, suppliers, or employees. Its sole purpose will be to contest your right to the goodwill of the community. We wish to emphasize that we are not requesting or seeking, and do not desire, you to cease or refrain from doing business with any person, firm or corporation. Nor do we claim to represent, or seek or organize, any of your employees, and we do not request or desire your recognition as their representative.

"If you have any comment or question concerning this matter, please communicate the same by letter, which will be referred to our Executive Board for appropriate consideration and action. Neither the undersigned, nor any other person, has authority to discuss this matter in behalf of the union."

Plaintiff didn't go along with the request of the Building and Construction Trades Council, and, true to its word, pickets showed up at two of plaintiff's jobs in Fort Collins, Colorado, (a) the Everitt Office Building job, and (b) the Markley Motors job. Leaflets were handed out by the pickets, and these leaflets said:

"MESSAGE TO THE PUBLIC

"We are picketing REID BURTON because of his refusal to sign a sub-contracting agreement for future job site work. If you believe in the cause of fair wages and working conditions for American workers, please telephone or write to Reid Burton and request him to sign our sub-contracting agreement for future job site work.

"Our picket is not directed against any other employer, and we have no dispute with any other employer on this project.

"Thank you!

"COLORADO BUILDING AND CONSTRUCTION TRADES COUNCIL

"The person giving you this leaflet is not authorized to discuss this or any other matter in behalf of the Colorado Building and Construction Trades Council."

Additionally, signs were posted which read:

"REID BURTON CONST. CO. Has No Contract With Colorado Building & Constr. Trades Council. We have no dispute with any other person or Co. on the project."

A responsible officer of the Local admitted to a representative of plaintiff that there was no claim by defendants of a contract violation by plaintiff, and defendants made a tongue in cheek disavowal any intention of a strike. However, for the most part the carpenters didn't show up for work, and defendants say that their failure to work was not because of any strike, but, rather, the men's conduct was purely "voluntary" individual action. Defendants assert that they neither influenced, persuaded or coerced the union carpenters not to work. The record belies defendants' pious contentions. Two of the union carpenters didn't "voluntarily" stay away from work. They made the mistake of voluntarily showing up for work. Retribution was swift. The business representative of Local 1340 filed charges against each of the carpenters who didn't "voluntarily" stay home. They were charged with, "Working behind a picket line duly authorized by a subordinate body of the United Brotherhood (Building and Construction Trades Picket) Working on Markley Motors

Building, South College Avenue, Fort Collins, Colorado, 80521, on or about the 13th of March, 1973." To add insult to injury, although one of the carpenters lived in Longmont and the other in Ft. Collins, Colorado, their trial was held in Montrose, Colorado. As sure as death and taxes, they were convicted and fined, but as a result of later N.L.R.B. action, the fines were set aside. Although I have admitted to naivete in relying on the good faith of counsel, I am not so gullible as to accept defendants' protestations of innocence of violation of the no strike clause of the contract. Communications between all three named defendants were open at all times, and the entire episode was one of tripartite self help. The record in this case convinces beyond peradventure that Carpenters District Council of Southern Colorado violated the no strike clause of the labor contract to which it was a party and that Local 1340 of the International Brotherhood of Carpenters & Joiners of America, AFL-CIO violated the same provision of the same contract which the local has now judicially admitted was binding on it. The defendants flagrantly violated the contract jointly and severally.

Plaintiff sustained damage as a result of those violations. The fact of damage is certain, although the amount of damage is somewhat less certain. Defendants did not controvert the damage testimony, and the record made in this case permits a finding, and I find that as a result of defendants' contract violations, plaintiff was damaged in the amount of $6,392.52 on the Markley Motors job and in the amount of $4,409.45 on the Everitt job. Thus plaintiff was damaged in the total amount of $10,801.97 as a direct and proximate result of defendants' flagrant violations of the contract's provisions.

Having found that defendants broke their promise not to strike and having found the amount of damages resulting to plaintiff as a result of defendants' breach of contract, I must face up to the question of whether I have jurisdiction to enter judgment against defendants. To do this, I must decide whether the arbitration clause covers the dispute and makes

arbitration mandatory, and, I must decide whether because of waiver, repudiation, estoppel, laches or any other reason, the matter should not be sent to an arbitrator for decision.

The scope and effect of the arbitration clause in question must be decided under *Drake Bakeries v. Bakery Workers* (1962) 370 U.S. 254, and *Atkinson v. Sinclair Refining Co.* (1962) 370 U.S. 238, opinions by Justice White handed down the same day. *Atkinson* held that only employee grievances were subject to arbitration, while *Drake Bakeries* held that all contract disputes had to be arbitrated. In *Atkinson*, Justice White explained:

> "In Drake Bakeries, Inc. v. Local 50, post, decided this day, the question of arbitrability of a damage claim for breach of a no strike clause is considered and resolved in favor of arbitration in the presence of an agreement to arbitrate 'all complaints, disputes or grievances arising between them [i.e. the parties] involving . . . any act or conduct re relation between the parties."

Admittedly, Article XIII of the Carpenters' contract is not word for word with either *Atkinson* or *Drake Bakeries*, and plaintiff says that it is more comparable to *Atkinson* than it is to *Drake Bakeries*. Defendants, of course, take the opposite position. Without extended discussion, but after much thought, and after study of the many Supreme Court cases favoring arbitration, I must reluctantly agree with defendants, and I hold that the dispute is encompassed within the mandatory arbitration provisions of the labor contract in question.

The question then arises as to whether defendants can insist on arbitration in light of their conduct leading up to and during this case. That is to say, are defendants prevented from insisting on arbitration under principles of waiver,

repudiation, estoppel, laches or other equitable principles; and is this question to be decided by me or by an arbitrator? What I shall say presently will emphasize why I wholeheartedly agree with the views expressed by Justice Powell in *International Union of Operating Engineers, Local 150, AFL-CIO v. Flair Builders,* (1972) 406 U.S. 487, but Justice Powell was speaking in dissent joined in by the Chief Justice. I am bound by the majority view, and as I read *Flair Builders,* it is for the arbitrator to decide whether defendants can still insist on arbitration.

This conclusion presents the difficult question of whether I should dismiss this case or stay it pending arbitration. If I dismiss the case, plaintiff's appellate rights are certain, but if I stay it, plaintiff may have to go through an arbitration before it can appeal, and the Court of Appeals may hold that I am wrong in saying the disputes should be arbitrated. These factors argue in favor of dismissal.

On the other side of the coin, defendants have already made a 180 degree turn on the arbitrability question, and if I dismiss and plaintiff wants to arbitrate, defendants may make it a 360 degree turn. In this event, plaintiff would have to start all over again. Moreover, there is more than remote chance that the arbitrator will hold that under principles of waiver, repudiation, estoppel or laches, defendants cannot insist on arbitration. Should either of these eventualities come to pass, if the case has been dismissed, plaintiff would have to commence a new lawsuit. Indeed, if there be no limit on the rule of *Flair Builders,* a recalcitrant party can stall a dispute forever. These factors argue in favor of a stay.

My inclination is to order a stay of this case pending arbitration, but plaintiff is the one burdened with the dilemma stemming from defendants' stalling. Accordingly, I shall and I do order that this case be stayed pending arbitration of the questions, but, if plaintiff would prefer a dismissal to perfect an

appellate record, I will probably grant a motion to alter and amend these findings and conclusions in this regard.

Dated at Denver, Colorado, this 19th day of November, 1974.

/s/Fred M. Winner
United States District Judge

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

REID BURTON CONSTRUCTION, INC., a Colorado corporation,	)	
Plaintiff-Appellant,	)	
v.	)	
CARPENTERS DISTRICT COUNCIL OF SOUTHERN COLORADO, LOCAL 1340 of the UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, COLORADO BUILDING AND CONSTRUCTION TRADES COUNCIL, unincorporated associations and labor organizations,	)	No. 75-1149 (C-5184)
Defendants-Appellees.	)	

APPEAL FROM THE UNITED STATES COURT FOR THE DISTRICT OF COLORADO

Robert G. Good, Denver, Colorado, for Appellant.

John W. McKendree, Denver, Colorado, for Appellees.

Before LEWIS, Chief Judge; SETH and McWILLIAMS, Circuit Judges.

LEWIS, Chief Judge.

Two clearly drawn but different issues are involved in this appeal: (1) Whether Reid Burton Construction's claim for damages arising out of the unions' alleged violation of the no-strike clause was arbitrable, and if so, (2) whether the unions, because of certain pleading and procedural tactics employed by them in the district court, were prevented by the equitable doctrines of waiver, estoppel, repudiation, or laches from asserting the arbitrability of Burton Construction's complaint. Finding both of these issues arbitrable, the district court dismissed the present action.

Since this appeal is not concerned with the merits of the underlying damage claim, we need only outline those facts which led to the filing of this action. Burton Construction, a signatory to a collective bargaining agreement with the Carpenters District Council of Southern Colorado and its affiliated local unions of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, was approached by the Colorado Building and Construction Trades Council to sign an agreement whereby it would only subcontract with other employers who were in contractual relationship to labor organizations affiliated with the Building Trades Council. Burton Construction refused to sign the agreement and the Building Trades Council picketed several of Burton Construction's building sites during parts of March and April of 1973.

In spite of a no-strike clause in the collective bargaining agreement, union carpenters refused to cross the picket lines. As a result, on July 13, 1973, Burton Construction filed this damage claim in district court against the Colorado Building and Construction Trades Council, the Carpenters District Council of Southern Colorado, and Local 1340 of the United Brotherhood of Carpenters and Joiners. All three of the defendants made motions to be dismissed from the lawsuit. The court did dismiss the Building Trades Council, but denied the similar motions of the District Council and Local 1340.

In their answers filed on November 9, 1973, the District Council and Local 1340 admitted jurisdiction under section 301 of the National Labor Relations Act as to the District Council, but asserted that "Local 1340 is not a party to the aforementioned collective bargaining agreement." Also in their answer, as an affirmative defense the District Council and Local 1340 alleged:

> This Court has no jurisdiction over the subject matter of this action because it involves the interpretation and application of the collective bargaining agreement . . . which is within the sole and exclusive province of the dispute resolution machinery contained therein which provisions contain the exclusive remedy for breaches thereof.

The unions also counterclaimed against Burton Construction alleging that it had breached the collective bargaining agreement by filing this action for failure to have first used the grievance and arbitration procedures contained in the agreement for processing disputes. In Burton Construction's answer to the counterclaim, it contended that the unions had waived their right to arbitration and that the counterclaim was barred because of laches.

More than a year after the complaint was filed, the unions admitted that while they did not consider Local 1340 to be a "party" to the collective bargaining agreement, they did consider it to be "bound by the substantive terms of the agreement." The case proceeded to a trial on October 1, 1974, wherein the trial court determined that both the alleged violation of the no-strike clause and the issue of whether estoppel, waiver, repudiation, or laches should prevent the unions from demanding arbitration were arbitrable issues. The trial court based the latter determination on its reading of Operating Engineers Local 150 v. Flair Builders, Inc., 406 U.S. 487. The trial court initially intended to order a stay pending the arbitration of these two issues, but noted that if Burton Construction would

prefer, the court would dismiss the action in order to perfect the appellate record. Burton Construction opted for the latter and this appeal followed.

I.

The first issue of whether Burton Construction's damage claim for alleged breach of a no-strike clause was an arbitrable issue must be decided by a careful analysis of Drake Bakeries Inc. v. Local 50, Bakery Workers, 370 U.S. 254, and Atkinson v. Sinclair Refining Co., 370 U.S. 238. Both of these cases, which were decided the same day, were damage actions brought by employers against the unions for violations of no-strike or work stoppage provisions in the respective collective bargaining agreements. In each case the unions argued that the issues were arbitrable and that the courts should stay the actions pending arbitration. Basing its opinion on the intended scope and effect of each collective bargaining agreement, the Court reached different results.

The fact that the Supreme Court reached different conclusions in *Atkinson* and *Drake Bakeries* is consistent with its earlier observation in *Warrior & Gulf Navigation* where it stated that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582. Our first question therefore is one of contractual interpretation — whether a violation of the no-strike clause was intended by Burton Construction and the unions to be subject to Article XIII, the grievance and arbitration provisions of the collective bargaining agreement.

Neither *Drake Bakeries* nor *Atkinson* definitively answers our question, since the language of Article XIII falls somewhere in between the pertinent grievance and arbitration provisions in those cases. In *Atkinson*, the Court found it persuasive that the grievance and arbitration clause applied only to employee-initiated grievances and was not intended to

include "all of their possible disputes."[1] The applicable grievance provision in *Drake Bakeries*, however, was much more broadly written — it was to include "all complaints, disputes, or grievances arising between [the parties]" — and clearly indicated that either labor or management could process a grievance.[2] The standard of analysis used by the Court apparently fixes on two factors: (1) Whether the grievance and arbitration provisions were wholly employee and union initiated or could be initiated by either the

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[1]The procedure for filing a grievance under the collective bargaining agreement in *Atkinson* clearly applied only to the employee- and/or union-initiated grievances:

> It is the sincere desire of both parties that *employee grievances* be settled as fairly and as quickly as possible. Therefore, when a grievance arises, the following procedure must be followed:
>
> 2. For the purpose of adjusting *employee grievances and disputes* as defined above, it is agreed that *any employee, individually or accompanied by his committeeman*, if desired shall:
>
> (a) Seek direct adjustment of any grievance or dispute with the foreman under whom he is employed. . . .
>
> (b) If the question is not then settled the employee may submit his grievance in writing, on forms supplied by Union . . . .

Quoted in Atkinson v. Sinclair Refining Co., 370 U.S. 238, 250 (emphasis added).

[2]Unlike the language in *Atkinson*, the grievance procedure in *Drake Bakeries* unequivocally was designed to allow either the employee or the employer to initiate grievance procedures:

> (a) The parties agree that they will promptly attempt to adjust all complaints, disputes or grievances arising between them involving questions of interpretation or application of any clause or matter covered by this contract or any act or conduct or relation between the parties hereto, directly or indirectly.

employees or the employer, and (2) whether disputes over the violation of no-strike clauses were intended by the parties to be subject to grievance and arbitration procedures.

Each of the cases that has ruled that a violation of a no-strike clause is not subject to arbitration has done so when the grievance and arbitration provisions were wholly employee and union initiated.[3] Burton Construction contends that Article XIII is wholly employee initiated, citing the following language:

> In the event that a dispute arises involving the application or interpretation of the terms of this

[2]Continued

> In the *adjustment of such matters the Union shall be represented in the first instance by the duly designated committee and the Shop Chairman and the Employer shall be represented by the Shop Management.* It is agreed that in the handling of grievances there shall be no interference with the conduct of the business.
>
> (b) If the Committee and the Shop Management are unable to effect an adjustment, then the *issue involved shall be submitted in writing by the party claiming to be aggrieved to the other party.* The matter shall then be taken up for adjustment between the Union and the Plant Manager or other representative designated by management for the purpose. If no mutually satisfactory adjustment is reached by this means, or in any event within seven (7) days after the submission of the issue in writing as provided above, *then either party shall have the right to refer the matter to arbitration as herein provided.*

Quoted in Drake Bakeries, Inc. v. Local 50, Bakery Workers, 370 U.S. 254, 257 N.2 (emphasis added.)

[3]*See, e.g.*, Friedrich v. Local 780, IUE, 5 Cir., 515 F_2 225; Faultless Division v. Local 2040, I.M. & A.W., 7 Cir., 513 F_2 987, 990; Affiliated Food Distributors, Inc. v. Local 229, Teamsters, 3 Cir., 482 F_2 418, *cert. denied*, 415 U.S. 916; Firestone Tire & Rubber Co. v. Rubber Workers Union, 5 Cir., 476 F_2 603, 605-06; G. T. Schjeldahl Co. v. Local 1680, Machinists, 1 Cir., 393 F_2 502; Boeing Co. v. UAW Local 1069, 3 Cir., 370 F_2 969.

> agreement, reasonable and diligent effort shall be exerted by the employee with the employer's representative, the employee contacting the business representative through the steward, and/or the business representative with the employer's representative [.]

We find this language ambiguous as to whether an employer can initiate a grievance, but in the context of the sentence immediately following the quoted language, it becomes apparent that the parties intended that either party could process a grievance:

> If the two parties are unable to reach a settlement, the dispute shall be reduced to writing and *the aggrieved party* shall notify *the other party* the dispute is being referred to a Board of Adjustment.

(Emphasis added.) Reference to the parties as "the aggrieved party" and "the other party" is, as was the case in *Drake Bakeries*, indicative that under the agreement either party could initiate the grievance procedure.

The second prong of the *Atkinson-Drake Bakeries* analysis is one of contractual interpretation — whether the language of Article XIII is broad enough to include alleged violations of the no-strike clause. Article XIII provisions were intended to cover any "dispute. . . involving the application or interpretation of the terms of th[e] agreement." This language is much more analogous to the language in *Drake Bakeries*, which the Court determined was broad enough to cover a violation of a no-strike clause, than to the corresponding provision in *Atkinson*.[4] The similarity between Article XIII

[4]The parties in *Drake Bakeries* had agreed to attempt adjustment of "all complaints, disputes or grievances arising between them involving questions of interpretation or application of any clause or matter covered by" the agreement, whereas in *Atkinson*, the grievance procedure only applied to "any difference regarding wages, hours or working conditions . . . ."

and the language in *Drake Bakeries* together with the *Warrior & Gulf* presumption of arbitrability — that disputes should be arbitrated "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute" — convinces us that the district court correctly concluded that under this collective bargaining agreement, the alleged violation of the no-strike clause was an arbitrable issue.

II.

In its trial memorandum, Burton Construction raised the issue of whether the unions were estopped from claiming any right of arbitration on the basis of certain equitable principles (*e.g.*, repudiation, laches, waiver) because of their dilatory pleading practices before the district court. Before confronting this issue, however, the district court had to determine whether judicial proceedings or arbitration was the proper forum for determining the merits of the equitable defenses raised by Burton Construction. Reluctantly, the district court answered that equitable defenses should also be decided by arbitration as mandated by Operating Engineers Local 150 v. Flair Builders, Inc., 406 U.S. 487. We cannot agree with the district court's conclusion that in every instance where the parties of a section 301 action are bound by a collective bargaining agreement *Flair Builders* requires questions of waiver, repudiation, estoppel, laches or other equitable defenses to be determined by an arbitrator. We deem this broad conclusion to be subject to an important limitation.

The issue in *Flair Builders* was whether a party to a collective bargaining agreement may be so dilatory in making the existence of a "vaguely delineated dispute" known to the other party that a court is justified in refusing to compel the submission of an otherwise arbitrable issue to an arbitrator. The Supreme Court did not directly answer this question, but instead ruled that the arbitration clause in that case was so broadly worded as to include also the arbitration of the laches

issue. The Court, noting that its decision did not excuse a judicial examination of the scope of an arbitration clause as to whether equitable defenses should be decided by the arbitrator or the court, concluded that

> once a court finds that, as here, the parties are subject to an agreement to arbitrate, and that agreement extends to "any difference" between them, then a claim that particular grievances are barred by laches is an arbitrable question under the agreement.

Operating Engineers Local 150 v. Flair Builders, Inc., 406 U.S. 487, 491-492. Thus, *Flair Builders* did not determine that every equitable defense was an arbitrable issue, but that its arbitrability hinged upon the scope of the arbitration clause.

The equitable defense in the instant case arose from alleged "evasive" and "dilatory" pleading tactics by the unions in the district court proceedings, specifically the fact that the unions claimed that Local 1340 was not a party to the collective bargaining agreement, later admitting that while Local 1340 was not a party it was still bound by the provisions of the agreement. Courts must, of course, maintain judicial control of their own proceedings. Such power, we assert, is broad enough to include a court's determination of the validity of equitable defenses arising out of the action of parties before the court. To hold otherwise would unnecessarily hamper a court's control of its proceedings.

We do not read *Flair Builders* nor its progeny as requiring a district court to flatly forego the exercise of its traditional powers in favor of arbitration in determining the merits of alleged equitable defenses. After analyzing and reviewing *Flair Builders* and the subsequent cases citing it, we conclude that *Flair Builders* can be confined to the proposition that certain broadly-worded arbitration clauses require the arbitration of equitable defenses arising out of the formation of a collective bargaining agreement or the processing of a

grievance,[5] be they intrinsic procedural questions or extrinsic questions as defined by John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543.[6] This is not an unduly narrow reading of *Flair Builders*. Surely, no one would contend that an express waiver of a party's right to demand arbitration during the course of a case in district court would not be adequate legal grounds for the district court to proceed to the merits of an otherwise arbitrable dispute without requiring arbitration.

The test employed by the Supreme Court in *Flair Builders* to determine the arbitrability of the laches issue was whether the parties had, by the language of the collective bargaining agreement, intended that such a dispute be arbitrable. Following this test, we must determine whether Burton Construction

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[5]*See, e.g.*, H & M Cake Box, Inc. v. Bakery Workers Local 45, 1 Cir., 493 F_2 1226, *cert. denied*, 419 U.S. 839; General Dynamics Corp. V. Local 5, Marine and Shipbuilding Workers, 1 Cir., 469 F_2 848; Operating Engineers Local 139 v. Carl A. Morse, Inc., E. D. Wis., 387 F. Supp. 153; Local 552, Brick and Clay Workers v. Hydraulic Press Brick Co., S.D. Mo., 371 F. Supp. 818. *But see* Ladies' Garment Workers' Union v.Ashland Industries, Inc., 5 Cir. 488 F_2 641, *cert denied*, 419 U.S. 840.

[6]Two cases citing *Flair Builders*, however, have called for the arbitration of equitable defenses not arising out of the processing of a grievance or the formation of a collective bargaining agreement. Controlled Sanitation Corp. v. District 28, I.M. & A.W., 3 Cir., 524 F_2 1324, *cert. denied*, 44 U.S.L.W. 3471; Local 542, Operating Engineers v. Penn State Construction, Inc., M.D. Pa., 356 F. Supp. 512. In each of these section 301 actions, the defendants alleged arbitrability of the underlying dispute. Because of certain pleading delays on the part of the defendants, the plaintiffs in each case countered the arbitrbility claim, asserting that the defendants had waived or repudiated their right to arbitrate the dispute. As was the case with the district court in this instance, the courts held that *Flair Builders* mandated the arbitration of the waiver and repudiation defenses, but neither court focused on what we have determined to be a crucial distinction — a court's inherent and unrestricted power to control the judicial functions.

and the unions agreed to arbitrate any questions of equitable defenses arising out of misconduct in court cases in which the two were parties. As discussed earlier, the language of Article XIII was broad enough to include disputes dealing with violations of the no-strike provision and would probably cover the type of laches defense raised in *Flair Builders*, but we do not believe that the parties ever intended to include the arbitration of equitable defenses arising out of actions by a party in proceedings before a district court. Indeed, even had the parties so intended, we would conclude that such an agreement would clearly exceed the proper subject matter of a collective bargaining agreement and would not be enforceable in court; it would be improper for the prospective parties of a lawsuit to attempt by contract to bind the exercise of a court's inherent judicial function.

Allowing federal courts to retain jurisdiction under section 301 of the National Labor Relations Act of an otherwise arbitrable dispute because of certain misconduct of one of the parties in the judicial proceedings themselves which gives rise to some type of estoppel to claim arbitrability is not inconsistent with the strong national labor policy favoring arbitration of labor disputes. As noted earlier, this policy is partly premised on the understanding that

> arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. . . . An order to arbitrate . . . should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.

United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83. If it can be concluded with "positive assurance" that the parties did not intend to arbitrate certain disputes, the policy favoring arbitration does not come into play. As discussed above, the parties in this case neither

intended nor had the power to require arbitration of certain equitable defenses that have traditionally been decided exclusively by the courts.

In conclusion, therefore, we hold that the trial court erred in ruling that it was "bound" by *Flair Builders* to submit to arbitration the question of whether the unions should be prevented from demanding arbitration because of "evasive" and "dilatory" pleading practices before the court. It is entirely appropriate in some instances for a district court to retain section 301 jurisdiction of an arbitrable dispute where, because of conduct before the court, it may be deemed that a party is prevented on the basis of some equitable principle from asserting a right to arbitration. Whether the instant case is one such instance has not been decided. Therefore, we remand this case for such a determination. If the district court finds that there has been no estoppel or waiver because of the unions' conduct in pleading, then it is proper to order arbitration of the underlying dispute — the alleged violation of the no-strike clause. If on the other hand it is determined that the unions have waived their right to arbitration, or in some other way should be prevented from asserting his right, because of conduct which falls within the control of the court, then the district court can properly proceed to the merits of the underlying dispute.

In sum we conclude that the enumerated equitable defenses discussed are, in general, mandated by *Flair Builders* to the arbitrator for determination of the continued vitality of the contractual arbitration process. However, if such defenses arise solely during the course of the judicial process the arbitrator is not the one to determine whether the judicial process has been abused by either party or at all or whether an equitable defense to the main dispute has been established during the course of the judicial trial by in-trial conduct.

Remanded.